No. 88-192

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

MCKESSON CORPORATION,
Petitioner,
v.
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

JOINT APPENDIX VOLUME II

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PETITION FOR CERTIORARI FILED, July 28, 1988
CERTIORARI GRANTED, November 14, 1988

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IN THE CIRCUIT COURT OF THE SECOND
JUDICIAL CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA

MCKESSON CORPORATION,

Plaintiff,

vs. CASE NO. 86-2997

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO, DEPARTMENT OF
BUSINESS REGULATION, and OFFICE
OF THE COMPTROLLER, STATE OF FLORIDA,

Defendants.

ORDER ON MOTION FOR PARTIAL SUMMARY
JUDGMENT AND FOR PRELIMINARY INJUNCTION

This matter came to be heard on Motion for Partial Summary Judgment filed by the Plaintiff and the Court having heard argument of counsel and being otherwise advised in the premises hereby finds:

1. Plaintiff is and has been a licensed distributor of beer, wine and distilled spirits in the State of Florida. As a licensed distributor, it is liable for the payment of alcoholic beverage taxes pursuant to F.S. 564.06 and 565.12 (1985) the legal incidence of which falls on Plaintiff by virtue of its status as a licensed distributor.

2. Plaintiff sells wine subject to the full rates of taxation set forth in F.S. 564.06 (1), (2), (3) and (4) and distilled spirits subject to the full rates of taxation set forth in F.S. 565.12(1)(a) and (2)(a). These wines and distilled spirits are not now exempt or entitled to a tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985). These alcoholic beverages are manufactured both in states other than Florida and in foreign countries.

3. Such alcoholic beverages sold by Plaintiff compete in the Florida market place with alcoholic beverages of the same type as referred to in paragraph 2 above but which have been granted a tax exemption or tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985).

4. The Plaintiff has challenged the constitutionality of F.S. 564.06 and 565.12, including the tax preference provisions found in F.S. 564.06(2), 564.06(3) following the term "$3.00 per gallon," F.S. 564.06(4) following the term "$3.50 per gallon," 564.06(7), and 564.06(9) through (13) and F.S. 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) (1985).

5. Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)*, which held a Hawaii liquor tax exemption for locally produced alcoholic beverages unconstitutional as a violation of the Commerce Clause, Florida's alcoholic beverage laws granted excise tax exemptions and preferences to alcoholic beverages manufactured or bottled in Florida from Florida grown products. The similarity between these provisions of Florida law, and the Hawaii law struck down in *Bacchus* prompted the Florida Legislature to consider revising the statutes.

6. During the 1985 Florida legislative session, the legislature enacted Committee Substitute for House Bill 521, Florida Session Laws 85-203, and Committee Substitute for House Bill 530, Florida Session Laws 85-204, both effective July 1, 1985, which became sections 564.06 and 565.12, Florida Statutes (1985). The legislature removed the requirement from the former provisions that alcoholic beverages had to be produced from Florida products and manufactured and bottled in Florida, substituted language identifying certain agricultural products whose use in the production of the alcoholic beverages would entitle the manufacturers and distributors to tax preferences and exemptions, and inserted language denying the tax exemption or tax preference in certain circumstances.

7. These amendments were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic

beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

Based upon the foregoing, it is hereby ORDERED and ADJUDGED:

1. That Plaintiff has standing to challenge the constitutionality of the alcoholic beverage tax statutes.

2. That Plaintiff's Motion for Partial Summary Judgment is hereby granted.

3. That the provisions of F.S. 564.06(2), (3) following the term "$3.00 per gallon," (4) following the term "$3.50 per gallon," (7) and (9) through (13) and F.S. 565.12 (1)(b), (1)(c), (2)(b), (2)(c), and (5) through (10) are hereby found to be unconstitutional on their face.

4. That this determination of unconstitutionality shall operate prospectively only from the rendition of this Order.

5. That Plaintiff's Motion for a Preliminary Injunction is hereby granted only to the extent that Defendants' are enjoined from enforcing the statutory provisions declared unconstitutional hereinabove at paragraph 3.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 20th day of March, 1987.

/s/Charles E. Miner, Jr.
CHARLES E. MINER, JR.
CIRCUIT JUDGE

Copies furnished to:
David Robertson
Bruce Rogow
M. Stephen Turner
Howell L. Ferguson
Daniel C. Brown

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FLA. BAR NO.: 191049

(Caption omitted in printing)

NOTICE OF APPEAL OF NON-FINAL ORDER

NOTICE IS GIVEN that the Division of Alcoholic Beverages and Tobacco, State of Florida Department of Business Regulation and the Comptroller of the State of Florida, Defendants, Appellate, appeal to the District Court of Appeal of the First Appellants District of the State of Florida the Order of this Court rendered March 20, 1987. The nature of the order is a non-final order granting partial summary judgment declaring unconstitutional certain subsections and portions of certain subsections of sections 564.06 and 565.12, Florida Statutes (1985) and granting a preliminary injunction restraining defendants from enforcing those portions of the statute which are declared to be unconstitutional.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/s/ Daniel C. Brown
DANIEL C. BROWN
Assistant Attorney General
Department of Legal Affairs
Tax Section, The Capitol Bldg.
904/487-2142
COUNSEL FOR DEFENDANT

(Certificate of Service omitted in printing)

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

DOCKET NO. _____

(Caption omitted in printing)

SUGGESTION

I. INTRODUCTION

McKesson Corporation ("McKesson") respectfully requests this Court, pursuant to Fla. R. App. P. 9.125, to certify that the Order of the Circuit Court, Judge Charles E. Miner, Jr. (attached as Appendix A) involves issues of great public importance that require the Supreme Court's immediate resolution.

On September 3, 1986, McKesson filed its complaint in the Circuit Court challenging the constitutionality of sections 564.04 and 565.12, Florida Statutes (1985) ("Florida Tax Statutes"). Tampa Crown Distributors, Inc. ("Tampa Crown") and Florida Beverage Corp., Inc. ("Florida Beverage"), and Brown-Forman Corporation ("Brown-Forman") also filed complaints challenging the Florida Tax Statutes. McKesson, Tampa Crown, Florida Beverage, and Brown-Forman asked the Circuit Court to review Florida's enforcement of tax statutes which provide millions of dollars in revenue to the State.

In the separate but related actions, McKesson, Tampa Crown and Florida Beverage, and Brown-Forman present federal and state constitutional claims that question the constitutionality of the Florida legislature's efforts to promote Florida's agricultural industry by granting certain exemptions from taxation and preferences in taxation for alcoholic beverages that use certain favored agricultural products.

Specifically, McKesson makes the following arguments:

(1) The Florida Tax Statutes impermissibly discriminate against interstate and foreign commerce and thus violate the United States Constitution's Commerce Clause;

(2) The Florida Tax Statutes impermissibly involve Florida in foreign affairs and international relations and thus violate the United States Constitution;

(3) The Florida Tax Statutes impermissibly discriminate against foreign imports and thus violate the United States Constitution's Import-Export Clause;

(4) The Florida Tax Statutes establish improper classifications which violates the United States Constitution's Equal Protection Clause and the Florida Constitution's Equal Protection Clause;

(5) The Florida Tax Statutes do not set forth sufficient standards or limitations to guide the executive branch in the exercise of its delegated authority and thus violate the Florida Constitution.

On November 12, 1986 and November 26, 1986, Judge Charles E. Miner, Jr. of the Circuit Court, conducted hearings on McKesson's motions for partial summary judgment and for a preliminary injunction, Tampa Crown and Florida Beverage's motion for summary judgment, and Brown-Forman's similar motion. In addition to hearing plaintiffs and defendants, Judge Miner also heard arguments from Jacquin-Florida Distilling Co., Inc. and Todhunter International, Inc., intervening as defendants.

On March 20, 1987, the Court entered its Orders granting, in whole or in part, McKesson's motions for partial summary judgment and for a preliminary injunction, Tampa Crown and Florida Beverage's motion for summary judgment, and Brown-Forman's motion. On the same day, the Attorney General, representing all defendants, filed a notice of appeal.

II. THE APPEAL'S GREAT PUBLIC IMPORTANCE REQUIRES THE SUPREME COURT'S IMMEDIATE RESOLUTION

The Circuit Court declared unconstitutional provisions of a tax scheme that generates millions of dollars in revenue for Florida. For example, Florida collected from McKesson, during its fiscal years ending March 31, 1984, 1985, and 1986, a total of $86,858,671 in excise taxes under the Florida Tax Statutes and their predecessors and will collect millions from McKesson under the Florida Tax Statutes this fiscal year.[1] In its complaint, McKesson prays for a refund of all monies unconstitutionally collected. Florida continues to collect excise taxes under the tax statutes.[2] In order to protect Florida's financial position, Florida, as well as the taxpayers, has a significant interest in a rapid determination of the constitutionality of the tax statutes.

The Circuit Court's Orders implicate not only Florida's collection of enormous revenues under the Florida Tax Statutes but also Florida's latitude in promoting its industry without violating the United States Constitution and the Florida Constitution. McKesson claims that the Florida Tax Statutes favor the products of Florida at the expense of the products of other states and countries. Since Florida has no interest in the enforcement of unconstitutional statutes, *see Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982), Florida has a great interest in expeditiously resolving the constitutional issues.

In *Miller v. Publiker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), a strikingly similar constitutional case, Judge Miner found a gasohol tax scheme, which granted a tax preference for gasohol produced from certain agricultural products, unconstitutional under the United States

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[1] The legislature revised the Florida Tax Statutes in 1985. McKesson challenges the revised version in this case and challenges the former statutes in a separate case that is not before this court.

[2] The Circuit Court's preliminary injunction enjoining enforcement of the Florida Tax Statutes' preference provisions was automatically stayed pursuant to Fla. R. App. P. 9.310(b)(2). McKesson plans to ask the Circuit Court to vacate the automatic stay.

Constitution's Import-Export Clause and Commerce Clause. The First District Court of Appeal certified that the circuit court judgment involved issues of great public importance that required the Supreme Court's immediate resolution. The Supreme Court accepted jurisdiction and unanimously affirmed Judge Miner's judgment.

McKesson submits that this case deserves the same procedural treatment.

CONCLUSION

McKesson suggests that the constitutional issues in this case substantially affect Florida's interest, as well as all other states' and countries' interest, in maintaining free, unrestricted trade among the states and with foreign countries and Florida's interest in protecting its revenues from taxes on alcoholic beverages. The issues in this case warrant this Court's exercising its discretion to certify that the Circuit Court Order requires immediate Supreme Court resolution.

CERTIFICATION

I express a belief, based on a reasoned and studied professional judgment, that this appeal requires immediate resolution by the Supreme Court and is of great public importance.

Dated: March 30, 1987.

/s/James M. Ervin, Jr.
JAMES M. ERVIN, JR.
HOLLAND & KNIGHT
P.O. Drawer 810
Tallahassee, Florida 32302
(904) 224-7000
Counsel for McKesson Corporation

(Certificate of Service omitted in printing)

Appendix A

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997

(Caption omitted in printing)

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR PRELIMINARY INJUNCTION

This matter came to be heard on Motion for Partial Summary Judgement filed by the Plaintiff and the Court having heard argument of counsel and being otherwise advised in the premises hereby finds:

1. Plaintiff is and has been a licensed distributor of beer, wine and distilled spirits in the State of Florida. As a licensed distributor, it is liable for the payment of alcoholic beverage taxes pursuant to F.S. 564.06 and 565.12 (1985) the legal incidence of which falls on Plaintiff by virtue of its status as a licensed distributor.

2. Plaintiff sells wine subject to the full rates of taxation set forth in F.S. 564.06(1), (2), (3) and (4) and distilled spirits subject to the full rates of taxation set forth in F.S. 565.12(1)(a) and (2)(a). These wines and distilled spirits are not now exempt or entitled to a tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985). These alcoholic beverages are manufactured both in states other than Florida and in foreign countries.

3. Such alcoholic beverages sold by Plaintiff compete in the Florida market place with alcoholic beverages of the same type as referred to in paragraph 2 above but which have been granted a tax exemption or tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985).

4. The Plaintiff has challenged the constitutionality of F.S. 564.06 and 565.12, including the tax preference provisions found in F.S. 564.06(2), 564.06(3) following the term "$3.00 per gallon," F.S. 564.06(4) following the term "$3.50 per gallon," 564.06(7), and

564.06(9) through (13) and F.S. 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) (1985).

5. Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which held a Hawaii liquor tax exemption for locally produced alcoholic beverages unconstitutional as a violation of the Commerce Clause, Florida's alcoholic beverage laws granted excise tax exemptions and preferences to alcoholic beverages manufactured or bottled in Florida from Florida grown products. The similarity between these provisions of Florida law, and the Hawaii law struck down in *Bacchus* prompted the Florida Legislature to consider revising the statutes.

6. During the 1985 Florida legislative session, the legislature enacted Committee Substitute for House Bill 521, Florida Session Laws 85-203, and Committee Substitute for House Bill 530, Florida Session Laws 85-204, both effective July 1, 1985, which became sections 564.06 and 565.12, Florida Statutes (1985). The legislature removed the requirement from the former provisions that alcoholic beverages had to be produced from Florida products and manufactured and bottled in Florida, substituted language identifying certain agricultural products whose use in the production of the alcoholic beverages would entitle the manufacturers and distributors to tax preferences and exemptions, and inserted language denying the tax exemption or tax preference in certain circumstances.

7. These amendments were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

Based upon the foregoing, it is hereby ORDERED and ADJUDGED:

1. That Plaintiff has standing to challenge the constitutionality of the alcoholic beverage tax statutes.

2. That Plaintiff's Motion for Partial Summary Judgment is hereby granted.

3. That the provisions of F.S. 564.06(2), (3) following the term "$3.00 per gallon," (4) following the term "$3.50 per gallon," (7) and (9) through (13) and F.S. 565.12 (1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) are hereby found to be unconstitutional on their face.

4. That this determination of unconstitutionality shall operate prospectively only from the rendition of this Order.

5. That Plaintiff's Motion for a Preliminary Injunction is hereby granted only to the extent that Defendants' are enjoined from enforcing the statutory provisions declared unconstitutional hereinabove at paragraph 3.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 20th day of March, 1987.

/s/ Charles E. Miner, Jr.
CHARLES E. MINER, JR.
CIRCUIT JUDGE

Copies furnished to:

David Robertson
Bruce Rogow
M. Stephen Turner
Howell L. Ferguson
Daniel C. Brown

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FL. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S MOTION TO VACATE AUTOMATIC STAY

Plaintiff, McKesson Corporation ("McKesson"), through its attorneys, hereby moves this Honorable Court that the Court, pursuant to Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure, enter an order vacating the automatic stay pending appellate review of this Court's March 20, 1987, Order on Motion for Partial Summary Judgment and for Preliminary Injunction.

McKesson bases its motion upon this motion, the memorandum in support of the motion, the pleadings, papers, and documents on file, and upon any oral argument to the Court at the hearing on the motion.

Wherefore, McKesson respectfully prays that the Court enter the requested order.

Dated: March 31, 1987.

(Certificate of service omitted in printing)

/s/ James M. Ervin, Jr.
JAMES M. ERVIN, JR.
HOLLAND & McKNIGHT
P. O. Drawer 810
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and

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 86-2997
FL. BAR NO. 353574

(Caption omitted in printing)

PLAINTIFF McKESSON CORPORATION'S
MEMORANDUM IN SUPPORT OF ITS
MOTION TO VACATE AUTOMATIC STAY

Plaintiff, McKesson Corporation ("McKesson"), submits this memorandum in support of its motion to vacate the automatic stay of this Court's Order of March 20, 1987.

INTRODUCTION

On March 20, 1987, this Court entered an Order in this case declaring unconstitutional certain provisions of sections 564.06 and 565.12, Florida Statutes (1985) and enjoining defendants from enforcing those provisions. On the same day, the Attorney General, representing all defendants, filed a notice of appeal, which automatically caused a stay of this Court's Order. However, the same provision that grants the automatic stay, Fla.R.App.P. 9.310(b)(2), also authorizes this Court to exercise its discretion to vacate the stay.

McKesson submits that this Court should vacate the automatic stay and thereby effectuate the Court's preliminary injunction. The Court's vacating the stay will prevent irreparable harm to McKesson and will cause no harm to defendants, who will realize an increase in alcoholic beverage tax revenues upon the vacating of the stay.

THIS COURT SHOULD VACATE THE STAY UNDER FLA. R. APP. P. 9.310 (b)(2)

In its motion for partial summary judgment and a preliminary injunction, McKesson demonstrated that the Florida tax statutes, by their protectionist purpose and discriminatory effect, offend the United States Constitution and the Florida Constitution. McKesson maintained that the Florida statutes unconstitutionally create a preferential trade area for local products in violation of the Commerce Clause, unconstitutionally impose a duty upon imports, and unconstitutionally interfere with the federal government's foreign affairs powers. McKesson submitted that this case presents a tax preference scheme as strikingly unconstitutional as the gasohol tax preference scheme struck down in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984). The Court found McKesson's arguments under the Commerce Clause sufficient to justify the granting of the motion. The likelihood that McKesson will prevail on appeal is substantial.

Neither Florida nor McKesson has any interest in the enforcement, even temporarily, of unconstitutional tax provisions. On one hand, if the Court does not vacate the stay, Florida's unconstitutional discrimination against McKesson will continue to cause McKesson to suffer injury in the competitive marketplace, constituting irreparable harm. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2948 at 440 (1973 & Supp. 1986). On the other hand, upon the vacating of the stay, defendants may continue to collect tax revenues from McKesson and other distributors under the challenged statutes while the parties pursue any appeals from this Court's Order. Thus, by vacating the stay, the Court would prevent further competitive injury to McKesson and would only bar defendants from discriminating among taxpayers.

Moreover, Florida's continuing to enforce the Florida tax statutes' exemptions and preferences, which this Court has declared unconstitutional, further exposes Florida's revenues to claims for

refunds. In its complaint, McKesson prays for a refund of all monies unconstitutionally collected under the defective tax statutes. McKesson contends that, as a matter of federal constitutional law as well as state law, the corporation is entitled to a refund of all taxes collected under the unconstitutional statutes. Defendants' collecting the taxes from McKesson and others under the unconstitutional statutes jeopardizes Florida's alcoholic beverage tax revenues.

CONCLUSION

In light of this Court's Order of March 20, 1987, neither plaintiffs nor defendants have an interest in a stay of the Court's Order pending appeal. This Court's vacating of the stay will protect McKesson against further unconstitutional injury and will preserve Florida's collection of tax revenues.

Accordingly, McKesson requests this Court to exercise its discretion by vacating the automatic stay.

Date: March 31, 1987.

/s/ James M. Ervin, Jr.
JAMES M. ERVIN, JR.
HOLLAND & KNGHT
P. O. DRAWER 810
TALLAHASSEE, FLORIDA 32302
(904) 224-7000

and

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(Certificate of service omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

[No Case Number Cited]

(Caption omitted in printing)

MOTION HEARING

The above-entitled matter came on to be heard before the Honorable CHARLES E. MINER, JR., Circuit Judge, at the Leon County Courthouse, Courtroom Number 3, Tallahassee, Florida, on the 2nd day of April, 1987, commencing at approximately 3:20 p.m.

Reported by:

RAY D. CONVERY
Court Reporter

APPEARANCES

HAROLD F.X. PURNELL, Attorney at Law, of the law firm of Oertell & Hoffman, Post Office Box 6507, Tallahassee, Florida, 32314-6705; and

M. STEPHEN TURNER, Attorney at Law, of the law firm of Turner & Mannheimer, Post Office Drawer 11300, Tallahassee, Florida, 32302-0033; and

BRUCE ROGOW, Attorney at Law, 2097 S.W. 27th Terrace, Fort Lauderdale, Florida, 32399-150; and

DAVE ROBERTSON, Attorney at Law, of the law firm of Morrison & Foerster, 345 California Street, San Francisco, California, 94104-2105; and

JOHN K. AURELL, Attorney at Law, of the law firm of Aurell, Fons, Radey & Hinkle, Suite 1000, Monroe-Park Tower, Post Office Box 10154, Tallahassee, Florida, 32302; and

THOMAS J. SCHULTE, Attorney at Law, Peninsula Federal Building, Suite 800, 200 Southeast First Street, Miami, Florida, 33131; and

THOMAS H. BARKDULL, III, Attorney at Law, 7500 Old Cutler Road, Coral Gables, Florida, 33143; appeared on behalf of the Plaintiffs.

DANIEL C. BROWN, Assistant Attorney General, Tax Section, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301; appeared on behalf of the Defendant.

PROCEEDINGS

(p.3)

THE COURT: I see we have other counsel here with us now today.

MR. ROGOW: We do, Judge.

THE COURT: Brought the heavyweights in, our dear friend Thomas J. Schulte, Miami, Florida, is here with us today.

MR. ROGOW: Representing United Liquors, Judge, and Mr. Aurell is going to be representing Jacquin of Florida on appeal. So we thought we'd bring them in early and get the flavor, that good citrus, cane flavor.

THE COURT: All right, Harry.

MR. PURNELL: Yes, sir, Judge. We've got a motion to vacate the automatic stay. As I'm sure everybody here knows, the

order was entered March 20th. The State appealed the same day, and pursuant to Rule 9.310, they're granted an automatic stay, but, of course this court retains jurisdiction to vacate that if that's considered just and proper.

We'd submit, in this case, that all of the equities, all of the justice would dictate lifting the stay. Given consideration of what you ruled, that these statutes are unconstitutional, and impose unconstitutional discrimination , I think it's clear (p.4) that lifting the stay is fair to all parties. To the Plaintiffs, it puts them on equal footing with the Intervenors who otherwise had the benefit of an unconstitutional statute. Intervenors must pay full rate. They no longer get the benefit from the unconstitutional statute, and particularly it's fair to the State who gets the full use of the tax revenues. Upon affirmance, if the stay is lifted, nothing more needs to be done. The case will be ended. In the unlikely event of reversal, the State still has its refund power and can still return those dollars.

THE COURT: The unlikely, did I understand you to say?

MR. PURNELL: Highly unlikely. Your Honor, continuing the stay, however, is unfair and inequitable under the circumstances because, first of all, it continues the discrimination that you found existed with that statute. More importantly, I think it's unfair to the Plaintiffs who fought that statute, had it held unconstitutional. It allows the Intervenors to continue to benefit from an unfair statute.

On the side of the State, it deprives them of the use of the funds. Should your ruling be upheld, but the stay not be lifted, the State's going to have to go back and back-assess, and that's a somewhat complicated (p.5) process, in light of the monthly recomputation of the tax. Also recognizing that your order is prospective only from March 20th, failure to lift the stay opens the State up to potential refunds during the period in which the stay is in effect because of the discrimination that continues to be visited on the Plaintiffs.

Also, the application process for the '87 - '88 fiscal year entitlement to use that refund reoccurs this July. It's about 90 days away. By

lifting that stay, it takes pressure off the State in the effort to grant those as quickly as possible to provide some certainty as to who is entitled to it and who isn't.

We'd respectfully submit that the only fair thing to do in this situation is lift the stay. No one is harmed. It enforces, effectively, what you ruled and puts everybody in the proper status quo.

THE COURT: Mr. Brown, I'm sorry -- I didn't mean to ignore you, would you concur in that observation?

MR. ROBERTSON: Your Honor, I have only a footnote. David Robertson of Morrison and Forrester (sic) for the plaintiff McKesson. Our complaint includes a prayer for damages on the basis that we are paying a tax and others are not paying the same tax, and therefore the entire tax statute in unconstitutional.

(p. 6)

If the Court were not to lift the stay, we would see a continuation of the status quo, and therefore we would see a continuation, a running of McKesson's claim for damages in this case. On the other hand, if the Court were to lift the stay so that all distributors are treated equally, obviously McKesson's claim for damages, although still there, would have far less force since the statute would have been altered.

So I'm in a sense making an argument for the people of Florida and against our prayer for damages in this case by saying that the Court's lifting the stay will increase the security of those tax revenues from attack.

THE COURT: All right, sir.

MR. BARKDULL: Excuse me, Your Honor. My name is Tom Barkdull. I represent Brown Foreman Corporation.

THE COURT: Have you anything to add to what was already --

MR. BARKDULL: I'm going to cut it down real short, Your Honor. I'm in full agreement with Mr. Purnell. The only thing I might add is that the State might want to put these revenues into a special account in the unlikely event that you are reversed, that they can be then refunded back.

THE COURT: You gentlemen make me feel good on this (p. 7) side of the table. Harry said highly unlikely. Is there any reason why you simply used the work "unlikely".

MR. BARKDULL: No, sir. Not at all.

MR. ROBERTSON: I would use the word extraordinarily.

THE COURT: Extraordinarily unlikely, almost unthinkable.

MR. ROBERTSON: Almost unthinkable.

THE COURT: Mr. Brown would not concur with that observation.

MR. BROWN: Your Honor, the State's position here today is as follows: The cases which have been cited on listing an automatic stay are a fairly recent vintage. There is a Supreme Court decision, *The City of Fort Lauderdale Lakes vs. Corn*, decided in 1982 by the Florida Supreme Court, and a decision by the Fourth District in 1984, of *St. Lucie County vs. North Palm Beach Development Corporation*. The sum and substance of those cases is that, with respect to legislative decisions of various organs of public government, the stay is automatic and it's imposed for public policy reasons and should only be lifted under compelling circumstances.

Now, those cases were factually somewhat different (p. 8) than this case is. Those cases dealt with a situation where there would clearly have been irreparable harm to the State's interest should the stay have been lifted and the Plaintiffs allowed to proceed along with the course of conduct they wished to proceed upon.

In this case the State has two interests: One is a fiscal interest, and lifting the stay would not affect the State's fiscal interest because of the nature of the order the Court has entered. The Court has stricken only the exceptions from the statute, leaving the base tax in place. So there should be no revenue implications to the State by lifting the stay.

The other interest of the State is the legislative policy-making position already taken by these statutes that it is in the best interests of Florida to encourage certain agricultural products to be used in the distilling of alcoholic beverages. That interest would in fact be interrupted were the stay to be lifted. I cannot in good faith argue to you that it would be interrupted on more than a temporary basis, should we win reversal on appeal, however.

Because of that balance --

THE COURT: Which I believe you believe to be highly likely, as opposed to Mr. --

MR. BROWN: Well, I suppose if we have to wieght (sic) (p.9) the scales, I would have to throw in an "extraordinary" and "highly likely" to contradict the "extraordinary" and "highly unlikely".

I prefer not to do that. I don't think it serves any purpose. In essence what the State's position is is that our interests are fairly evenly balanced in this case, and we would commit it to the Court's sound discretion.

THE COURT: All right. So we've got some that want to lift it. The State is neutral. Now we've got some who don't want to lift it.

MR. ROGOW: Judge, I'm not sure that we should read the State's spirit as being neutral in this case. I think that, while --

THE COURT: He'd be screaming, standing up and stomping if the State really cared; but, go ahead, I'd like to hear what you have to say, Bruce.

MR. ROGOW: Mr. Robertson said something about the people of the state of Florida and I think that's the starting point. The Legislature enacted a statute which provided for certain tax benefits because they thought that that was in the public interest to do so, to encourage the use of these products in manufacturing alcoholic beverages.

The Court has declared that unconstitutional. (p.10) The State has filed a notice of appeal which acts as the automatic stay. The case law speaks in very strong language, and I have copies of both of those cases. *Corn* talks about it is paramount for the government to have unrestricted appellate court review of their authority to act in a legislative capacity, and that's what we're talking about here, acting in a legislative capacity, and only the most compelling of reasons would justify vacating the automatic stay. Indeed, the reason why the automatic stay provision was put in the rule is to allow the State to protect those legislative interests while the matter goes up on appeal.

This court has ruled, but either the District Court of Appeal or the Florida Supreme Court or both, will get a chance to review that. In the interim, our position is that the status quo should be maintained. There is no harm to the State's interest because the State has already chosen this course by enacting the legislation that it did.

The State, by deciding to appeal, has said, "We want to take this up and get review as to whether or not we are right," and the law says that in that situation the stay should remain in effect unless there are the most compelling of reasons, and here, actually, the most compelling of reasons cuts in favor of (p. 11) maintaining the status quo, because, to take away the status quo would mean a whole restructuring of the alcoholic beverage industry with regard to cane and citrus manufacturing, and that's not what the State had in mind. The State had in mind maintaining this industry in the way that it envisioned with regard to the tax break.

Now, ultimatley (sic), if the tax break is unconstitutional, then the higher rates will have to be paid, but in the meantime the status quo ought to be maintained because the legislative enactment, even though declared unconstitutional by this court, still, under the Florida Appellate Rules, carries presumption that the status quo should remain intact pending review.

THE COURT: Mr. Aurell.

MR. AURELL: May it please the Court, my name is John Aurell, and I would like to enter my appearance as counsel for Jacquin Florida Distilling Company.

Your Honor, the rule does not say or provide what Mr. Purnell has suggested to you that it does, at least I don't believe so. The (p. 12) rule does not say that, if the Circuit Court finds a statute of the State of Florida unconstitutional that the stay should be lifted because the Circuit Court has found that to be the case. The rule imposes the automatic stay in exactly that situation, and that is done for purposes of public policy that have long been set in place, and there is a heavy burden for the exceptional case when, in your discretion, you may, if you wish, set that stay aside, and I suggest to you that this is not the case here.

We have a partial summary judgment situation. Your Honor ruled as a matter of law. There is an honest dispute as to that decision. I would like to think that you would not have been led into error if I had been here when you ruled, but, in any event, we will try, on appeal, to --

THE COURT: I know you will.

MR. AURELL: -- to get another result, but there is an issue of law. That's what the appellate courts are for. Timely appeals have been filed or will be filed by the Defendants. We're entitled to pursue our remedies that way. Your order is not final to that extent, and I respectfully submit, Your Honor, that there simply has been no

extraordinary showing why the general rule that the stay stay in place should be ignored in this situation.

THE COURT: Mr. Thomas J. Schulte.

MR. SCHULTE: Your Honor, I'm Thomas J. Schulte, and I represent United Liquors, and we're coming in on (p. 13) the appeal, and I would ask the Court to maintain the status quo on behalf of United Liquors. It would, indeed, I think -- know, cause irreparable harm if this stay was lifted. I see no --have heard no argument as to why it should be lifted, either from the Plaintiffs' side -- the Court's ruling, of course, is not infallible. The Plaintiffs in all due respect, take the position that it is, but this court, as we know, is not final until the Supreme Court gives its infallible decision because it is indeed final, and I would therefore ask the Court to -- implore the Court to maintain this status quo. Thank you. I join in the arguments.

THE COURT: All right. We've got three on one side, three on the other, depending on where you were seated at the counsel table, three asking that it be lifted, three asking that it be preserved.

Now, Mr. Brown, explain your position to me one more time so I don't misstate it. What is the position of the State now with respect to the stay? You're entitled to it. Do you want the stay to remain in force and effect?

MR. BROWN: The State has no strong desires in either direction, Your Honor. We believe that the statute is constitutional, which is why we have taken (p. 14) the appeal. We hope very strongly to succeed in that appeal. As I say, and as counsel for the intervenors have ably pointed out, the law is, the presumption is in favor of the stay, and the burden is upon the Plaintiffs to show some compelling reason why it ought to be lifted, but from the State's interest in this case, given the nature of the Court's ruling, the balancing of the State's interests in its legislative policy and in its fiscal policy, is relatively even, and, therefore, the State has no strong predisposition in either direction, other than the law gives that stay to us, and the Plaintiffs should show some compelling reason for it to be

overcome. We leave that to the discretion of the Court as to whether they have done that.

THE COURT: What was your suggestion, Mr. Barkdull?

MR. BARKDULL: My suggestion, sir, was that, should the stay be lifted, the funds that were generated by the lifting of the stay be placed in a special account, so that, should, in the unlikely event that you would be reversed, it could be easily refunded to the Defendants in this case.

MR. BROWN: On that one, Your Honor, I've got to jump up and scream.

THE COURT: Good, I was wondering if we were going to (p. 15) get a rise out of you at all this afternoon, Mr. Brown.

MR. BROWN: The State would object to that most strenuously, and I'd like to tell you why, if I might. If the Court decides to lift the stay, the practical effect of that will be that beverage distributors around the state, during the interim of the appeal, will pay the full tax rate on all beverages. Those will go into the State Treasury. There is a statutory mechanism in place, Section 215.26, allowing for refunds if we'd be successful on appeal. That administrative process was already created by statute and managed by the Department of Banking and Finance, and I do not wish to see the judiciary interpose itself into the financial management of State Government at this point.

MR. AURELL: Your Honor, if I may?

THE COURT: Yes.

MR. AURELL: One further point on that, it seems to me -- and I hope I'm not wrong for lack of knowledge as to the procedure of the case, but an appeal having been filed, I wonder if this court has jurisdiction to enter an order of that nature at this time?

THE COURT: I rather imagine that about the only thing I can do at this point in time is either decide (p. 16) to keep the stay in place or --

MR. ROBERTSON: Your Honor, could I make one comment about the legal standard?

THE COURT: Sure.

MR. ROBERTSON: I believe that Mr. Brown accurately stated the legal standard the first time he spoke. There are two cases, the *Corn* case and also the case out of the Fourth District which goes by the name of *North Palm*, that talk about the government having a right to have a stay remain in place, but both those cases were situations where developers were trying to overturn governmental planning for an area, and the fear was that, if the stay was lifted, the government would be irreparably harmed.

I think, in this particular case, if you use the actual underlying logic of those opinions, you will see a basis for lifting the stay. We are telling you today that we feel that we are entitled to a refund of tax monies paid under these unconstitutional statutes, and that right continues to accrue as long as that statute has the constitutional problems which led this court to throw it out, and I believe that -- the State obviously can speak for itself, but it would seem to me that the State has a very strong interest in preserving the integrity of the monies it collects under those (p. 17) statutes, which amount to millions of dollars a month, and this Court's not lifting the stay keeps the unconstitutional statute in place and, month by month, increases, in effect, the prayer for damages in this case. On the other hand, if the Court were to lift the stay, the Intervenors would not be irreparably harmed in the event they were to blindfold some court of appeal and get it to reverse you. In that event, as Mr. Brown said --

THE COURT: It seems like a lot of them have been successful in doing that lately.

MR. ROBERTSON: -- there are procedures for getting their money back.

So, to protect the integrity of a statute, to protect -- the Legislature's overriding purpose, I am sure, in enacting the statute was to raise revenues, not to grant the limited exemptions which we've seen, and I think that carrying out the legislative purpose in this particular case would be to free the statute of its unconstitutional provisions in terms of how it taxes next month and the month after that.

MR. ROGOW: Judge, I'd like to give you these two cases because they are the key to it, and --

THE COURT: I think perhaps that would be the best thing, is to let me look at the cases.

(p. 18)

MR. ROGOW: It is paramount for governmental bodies to have unrestricted appellate review, compelling interests, and I have something else to say about this, too, Judge.

THE COURT: Well, before you say it, Dan Brown looks like he was motivated to say something else in response to what this gentleman just said.

MR. BROWN: Your Honor, I'd like to make just a brief comment, and I don't mean this to be flippant, although it may sound that way. I don't think the Court, in its deliberations, although we're submitting it to your discretion, needs to give much weight to the argument that these particular Plaintiffs will hold some sort of financial gun to the State's head if the stay is not lifted. I wouldn't give their prayer for damages much of a prayer, to tell you the truth, but there is the potential out there of some nature which the Court should consider.

THE COURT: Now, Bruce?

MR. ROGOW: This kind of threat that we're going to get money from the State hasn't threatened the State. You don't hear the State worrying about that, and so they have couched this argument in the public interest, public spirit, merely to suit their purposes, but the State isn't worried about that claim for taxes, and Mr. (p. 19) Robertson is wrong about the purpose of this statute. Sure, it's to raise revenue. It's also to encourage industries that will ultimately benefit Florida, not encourage Florida industries. I'm not falling into that trap that Mr. Robertson would like to characterize this case as, but, by encouraging the use of cane and citrus in manufacturing alcoholic beverages, the Legislature has spoken and said, "We want people to use cane and citrus." We have two manufacturers now in Florida who happen to be using that product, and others around the country could if they chose to, and the Legislature has said, "We want them to have the advantage of it."

Where is there irreparable injury? There is irreparable injury to the cane industry, to the citrus industry. That's why the Legislature passed that statute, because to the extent that they take away this tax break pending appeal, those people will not have the benefit of selling their product, which is encouraged by the tax preference.

So it's real nice to hear Mr. Purnell and Mr. Robertson speak about saving the State, but let's get down to basics here: They want to save their client, and we're trying to save our client, and the State is saying, "It doesn't really make much difference to us, (p. 20) Judge, because, either we're going to collect the taxes, or we're not going to collect the taxes," but the State can't be extorted by this kind of argument, Judge. Our clients and the State Legislature are the ones who will be irreparably affected in terms of the State mandate being done away with pending appeal and the tax advantage that our clients have had that cane and citrus producers have had, will be taken away, and that's really what this case is about.

THE COURT: Let me read these cases. I'll be with you in just a very few minutes. Keep your seats everybody.

(Whereupon, a brief recess was had in the proceedings.)

THE COURT: All right, gentlemen. I an not inclined to lift the stay. I'll tell you why I'm not inclined to lift the stay. It has really to do with a healthy judicial respect for the legislative branch of government. I think that they were wrong but I certainly recognize that I'm not the be all and end all, and while I trust that the District Court of Appeal, or whomever, will see fit to affirm, I have to live with the prospect that they may not, but that really doesn't enter into my judgment, into my thinking on this.

(p. 21)

There is a deference that is due to the Legislature of Florida, and I have always tried to pay deference to that. This was, obviously, a planning-level decision
made by the Legislature to try to afford some relief in the premises.

Now, while I don't think that they did so in a constitutional fashion, and although the State does not argue strenuously one way or another, I feel that I have got to recognize, certainly, that it's at least a coequal branch of government, and that they've made a decision, and I'm not inclined to lift the stay.

Therefore, the application for lifting the stay will be denied.

Let me have an order to that effect, Mr. Dan Brown --

MR. BROWN: Yes, Your Honor.

THE COURT: -- simply with those words in it and I will sign it. Thank you, gentlemen.

(Whereupon, the proceedings were concluded.)

(Reporter's certificate omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

MCKESSON CORPORATION,
Plaintiff,

v. CASE NO. 86-2997

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO, DEPARTMENT OF
BUSINESS REGULATION, and OFFICE
OF THE COMPTROLLER, STATE OF FLORIDA,
Defendants.

ORDER ON PLAINTIFF'S MOTION
TO VACATE AUTOMATIC STAY

This matter came on for hearing in Tallahassee, Leon County, Florida on April 2, 1987 for consideration of the Plaintiff's motion to vacate the stay of judgment automatically occuring [sic] as a result of the State Defendants' appeal of this Court's order of March 20, 1987.

Having heard the arguments of counsel and being duly advised in the premises, the Court finds that the policy decisions of the legislature embodied in the statutes under review in this case were made in the public interest and are entitled tc deference by this Court, absent compelling circumstances, which have not been shown.

Accordingly, it is ORDERED AND ADJUDGED:

That Plaintiff's Motion To Vacate Automatic Stay is hereby DENIED.

So ordered in Chambers at Tallahassee, Leon County, Florida, this 9th day of April, 1987.

/s/ Charles E. Miner, Jr.
CHARLES E. MINER, JR.
Circuit Judge

Copies furnished to: James M. Ervin, Jr., Esq. Howell Ferguson, Esq.
Daniel C. Brown, Esq. John Aurell, Esq.
Bruce Rogow, Esq. M. Stephen Turner, Esq.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA,
IN AND FOR LEON COUNTY, FLORIDA. CIVIL.

CASE NO. 86-2997

(Caption omitted in printing)

NOTICE OF CROSS-APPEAL

NOTICE IS GIVEN that the Plaintiff/Appellee/Cross-Appellant, McKESSON CORPORATION, by and through its undersigned attorneys cross-appeals to the District Court of Appeal, First District of Florida, the Order of this Court rendered on March 20, 1987. The nature of the Order is an order granting partial summary judgment declaring unconstitutional portions of Sections 564.06 and 565.12, *Florida Statutes* (1985), granting a preliminary injunction enjoining Defendants from enforcing the provisions declared unconstitutional.

and ordering that the determination of unconstitutionality shall operate prospectively only from the rendition of the Order.

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McKESSON CORPORATION

/s/ Charles A. Wachter for
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FLORIDA BAR NO. 197394

(Certificate of Service omitted in printing)

IN THE SUPREME COURT OF FLORIDA

Wednesday, April 22, 1987

CASE NO. 70,368

DIVISION OF ALCOHOLIC BEVERAGES
& TOBACCO, ET AL.

Appellants,

vs.

McKESSON CORPORATION, d/b/a
MCKESSON WINE & SPIRITS COMPANY,
ET AL.

Appellees.

• •

CERTIFIED JUDGMENT FROM TRIAL COURT - ORDER ACCEPTING JURISDICTION, ESTABLISHING BRIEFING SCHEDULE AND SETTING ORAL ARGUMENT

The District Court of Appeal, First District, has certified, pursuant to article V, section 3(b)(5) of the Constitution of Florida, that the order of the trial court passes upon a question of great public importance requiring immediate resolution by this Court. We accept jurisdiction.

Counsel for the parties shall *file* briefs as follows: Appellants' brief on the merits shall be *filed* on or before May 5, 1987; Appellees' brief on the merits shall be *filed* on or before May 15, 1987; Appellants' reply brief on the merits shall be *filed* on or before May 18, 1987.

UNLESS BRIEFS ARE TIMELY FILED, THE PRIVILEGE OF ORAL AGRUMENT WILL BE FORFEITED.

The Clerk of the Circuit Court in and for Leon County, Florida, shall file the original record on or before April 27, 1987.

IT IS FURTHER ORDERED that the above case has been set for oral argument at 1:30 p.m. TUESDAY, MAY 19, 1987, with a maximum of thirty (30) minutes to the side allowed for argument.

BDM

C: Hon. Raymond Rhodes, Clerk
Hon. Paul F. Hartsfield, Clerk
Daniel C. Brown, Esquire
Howell L. Ferguson, Esquire
John Aurell, Esquire
M. Stephen Turner, Esquire
Barry R. Davidson, Esquire
James M. Ervin, Esquire
David G. Robertson, Esquire
Harold F.X. Purnell, Esquire
Bruce S. Rogow, Esquire
Martha W. Barnett, Esquire

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 70,368

(Caption omitted in printing)

On Appeal from the District Court of Appeal, First District, State of Florida, Case No's. BS-402, BS-403, BS-404

INITIAL BRIEF OF APPELLANTS DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION AND OFFICE OF THE COMPTROLLER

(Table of Contents and Table of Citations omitted in printing)

PRELIMINARY STATEMENT

As of Friday, May 1, 1987, the Clerk of Court for the Circuit Court of the Second Judicial Circuit, In And For Leon County, Florida had not completed the complilation (sic) and indexing of the record on appeal in these cases. Appellant, because of the briefing schedule order by this Court, is therefore unable to cite directly to the record in this initial brief. Rule 9.210(b)(3), *Fla. R. App. P.* Appellant has therefore prepared and filed an extensive appendix. Citations in this brief are made thereto.

The deposition of Mr. Stan F. Starzyk is referred to thusly: Starzyk, p. ____ line ____ - p. ____ line ____.

STATEMENT OF THE CASE AND THE FACTS

On June 29, 1984, the Supreme Court of the United States decided the case of *Bacchus Imports, Ltd. v. Dias*.[1] The *Bacchus* decision constituted a "novel approach to the Twenty-First Amendment".[2] The Court held for the first time since the enactment of the Twenty-First Amendment to the Constitution of the United States vesting regulation of alcoholic beverages in the several States, that the States may not legislate a beverage excise tax plan which has the purpose and effect of favoring locally produced alcoholic beverage products over such products produced in other places.[3]

At the time *Bacchus* was decided, the State of Florida, like many other states, had on its statute books alcoholic beverage excise tax provisions which granted tax-preferred treatment to alcoholic beverages made from certain base agricultural crops grown in Florida[4] and manufactured and bottled in Florida.[5]

In the legislative session next ensuing after the *Bacchus* opinion issued, the Florida legislature repealed the former exemption provisions. The 1985 Legislature enacted, instead, a tax classification system as follows: It imposed a maximum beverage excise tax on wines and distilled spirits in varying maximum amounts, dependent upon type of beverage and percentage of alcohol; it granted tax preference to wines and distilled spirits manufactured from citrus,

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1 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed. 2d 200 (hereafter "Bacchus").

2 *Bacchus, supra*, at 104 S.Ct. 3064, n.15 (STEVENS, REHNQUIST and O'CONNOR, JJ., dissenting).

3 *Bacchus, supra*, at 104 S.Ct. at 3052, 3057.

4 §§564.06, 565.12 Fla. Stat.(1984 Supp.) The crops were not exclusively indigenous to Florida. The full text of the former statutes is set forth at App. 1 - 3.

5 §564.06, 565.12, Fla. Stat. (1984 Supp.)

sugarcane and from grape species which will grow in Florida [6] or from the by-products or concentrates thereof no matter where the point of manufacture, and ,finally, it disallowed the tax preference to eligible alcoholic beverages under certain circumstances.[7]

The new tax provisions strike a balance between encouraging the use of agricultural products which Florida grows for the manufacture of alcoholic beverages and maintaining the tax base provided by the alcoholic beverage excise tax. In other words, the Florida Legislature struck a careful balance between the state's revenue needs and the object of encouraging the use of citrus, sugarcane and certain grape species in the manufacture of alcoholic beverages.

Citrus is grown widely throughout the United States and the world. App. 142 - 147. The same is true of sugarcane. R. ____, App. 148 - 147. The grape species are grown, not only in Florida, but throughout the Southeastern United States and the Atlantic States Region. R. ____, App. 142 - 147. The grape species can be grown anywhere that the vinifera grape species are cultivated. R. ____, App. 142 - 147.

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[6] As will be discussed below, the record reflects that neither sugarcane nor citrus, nor the grape species are exclusive to Florida; all grow other places; and the grape species can be grown anywhere that vinifera grapes can be grown.

[7] The full text of the present tax provisions are set forth at App. 4 - 7A. For purposes of discussion, the structure of the new tax provisions is readily summarized as follows:

	§ 564.06	§ 565.12
Provisions imposing flat tax on beverages	(1),(3),(4)	(1)(a),(2)(a)
Provisions giving product exemptions	(2),(3),(4)	(1)(b),(2)(b)
Provisions restricting exemptions in cases of advantage in manufacturing jurisdiction	(9)	(1)(c),(2)(c)
Provisions establishing floor, ceiling and sliding scale tax for exempted products	(10)(a),(b)(c)	(1)(b),(2)(b) (5),(6)
Provisions requiring manufacturer to apply for exemptive license	(11),(12)	(9)
Provisions requiring Application fee and annual license fee from manufacturers	(11),(12)	(9),(10)

142 - 147. Nevertheless, alcoholic beverages made from citrus, sugarcane and the grape species are regarded by consumers as less desirable than alcoholic beverages manufactured from vinifera grapes and other agricultural bases. R. ____, App. 134 - 135, 154, 189.

Thus, for example. although the grape species will grow anywhere vinifera grapes will grow, they are not presently grown in California or Italy, nor used there in the manufacture of alcoholic beverages. Introduction of the grape species in those localities would require three to five years This is true despite the fact that the end product in all fermenting or distilling processes is the same: ethanol. R. ____, App. 152 - 153. Similarly, although citrus is adapted to the production of wine and neutral spirits (ethanol), R. ____, App. 152 - 153, and although citrus is commercially grown in California and Italy, it is not used in the manufacture of wine coolers manufactured by Brown-Forman. Likewise, although sugarcane or its by-product, molasses, is the base from which rum is made, although rum is distributed by McKesson Corporation, Tampa Crown and Florida Beverage, and although sugarcane is adapted to the production of neutral spirits used in making vodka, for example, R. ____, App. 152 - 153, 192 - 193, it is nevertheless regarded as "inferior" for alcoholic beverages. R. ___, App. 134 - 135, 154, 189. Florida, then has an interest in devising means whereby consumers' receptivity to such alcoholic beverages, and thus the use of such products by manufacturers, is encouraged.

In view of the new counsel of *Bacchus*, Florida set about to do so by enacting Ch. 85-203, 85-204, Laws of Florida, effecive July 1, 1985.

Not satisfied with the Florida Legislature's response in the wake of *Bacchus*, the Appellees - Plaintiffs below - brought suit. Tampa Crown Distributors, Inc. and Florida Beverage Corporation.

Tampa Crown Distributors, Inc. ("Tampa Crown") and Florida Beverage Corporation ("Florida Beverage") filed their complaint in the trial court on March 6, 1986. It was served on the Division of Alcoholic Beverages and Tobacco ("DABT") on March 17, 1986. R. ____, App. 8. DABT supervises the collection of alcoholic beverage

excise taxes. In a six-count complaint Tampa Crown and Florida Beverage challenged §564.06 and 565.12, Florida Statutes (1985) under several provisions of the Constitution of the United States and the Florida Constitution. The core of the challenges was the contention that the tax-preferred treatment and disqualification provisions of §564.06(2), (3), (4), (9); 565.12(1)(b), (2)(b), (1)(c), (2)(c), Florida Statutes (1985) discriminated in favor of local commerce and against interstate commerce. Tampa Crown and Florida Beverage conceded that they were presenting a challenge to the facial constitutionality of the tax statutes only and were not bringing an "as applied" constitutional challenge. The trial court announced its intention to treat the case as a purely facial challenge to the statutes. R. ____, App. 273. By its Amended Answer, R. ____, App. 41, Motion For Judgment on the Pleadings, R. ____, App. 89, and Motion For Summary Judgment, R. ____, App. 67, DABT raised several Rule 1.140, (sic) defenses and affirmative defenses, including lack of standing, and estoppel.

Tampa Crown and Florida Beverage filed a motion for summary judgment and supporting affidavits. R. ____, App. 61, 181, 184. DABT filed affidavits in opposition to the motion for summary judgment and a stipulation of facts. R.____, App. 134, 142, 144, 148, 155. Based thereon, the record shows as follows: Florida Beverage and Tampa Crown are licensed wholesale distributors of alcoholic beverages in Florida. [8] They distribute alcoholic beverages to retail dealers and remit taxes on beverages which are not tax-preferred. Such beverages compete with tax-favored beverages sold by distributors. Appellees make the conclusory statement that, because of the tax differential, they are placed at a competitive disadvantage in the marketing of the products which they distribute. Within the United States, sugarcane is grown in Hawaii, Louisiana,

[8] Florida law divides alcoholic beverage distribution into three distinct tiers, each of which requires a license to engage in that particular activity: manufacture or importation, wholesale distribution and retail sales to consumers. §§561.14, Fla. Stat. (1985). The legal incidence excise tax is upon manufacturers and wholesale distributors, but is collected at the wholesale level. §§561.50; 561.506(2); 564.06(1),(6); 565.12(1)(a), 565.13 Fla. Stat. (1985)

Texas and Florida. It is grown widely throughout the world in many countries. R.____, App. 148 - 150. Citrus is grown within the United States in California, Louisiana, Texas, Arizona and Florida. It also grows in the following countries: Brazil, Japan, Spain, Italy, Mexico, Israel, India, Argentina and Egypt. R. ____, App. 142 - 147. The grape species which will qualify an alcoholic beverage for tax preference are presently grown in the Southeastern United States and along the Atlantic Seaboard. They can be grown anywhere that vinifera grapes are grown. R.____, App. 142 - 147. Wines and other alcoholic beverages manufactured from sugarcane, citrus and grape species are perceived as of inferior quality as compared to wines manufactured from vinifera grapes and other alcoholic beverages made from other crops. R. ____, App. 134 - 135, 154, 189.

Florida Beverage has taken advantage of the tax preference it now challenges by distributing products which hold exemption certificates granted to the manufacturers. Since the passage of the new exemption provisions Florida Beverage has reported as exempt and remitted taxes at the allowed lower rates on 139,019 gallons of distilled spirits and 15,174 gallons of wine. R. ____, App. 156. Florida Beverage distributes rum, which is made from sugarcane or its by-products. R. ____, App. 134 - 135. Tampa Crown has not distributed beverages currently entitled to favorable tax rates. It does not do so because of its belief that the currently exempted products are of inferior quality. R. ____, App. 134 - 135. Tampa Crown does distribute products made from sugarcane. R. ____, App. 134 - 135. It is important to note that neither Tampa Crown nor Florida Beverage is licensed as a manufacturer of alcoholic beverages. They are wholesale distributors only.

Neither Tampa Crown nor Florida Beverage alleged or offered any proof that a manufacturer whose sugarcane, citrus or grape beverages they distribute has ever applied for or been denied an exemption certificate under the disqualification provisions of the law. Nor is there any allegation or proof in the record that such would occur if application were made.

On November 12, 1986, the trial court heard argument on the motions for summary judgment, DABT's motion for judgment on the pleadings, and DABT's motion to strike affidavits. On March 20, 1987 the trial court entered a final judgment. R. ____, App. 274 - 277. The Court did not reach any issue raised by Appellees other than the Commerce Clause challenge. The trial court held that, although the Florida legislature intended to remedy the Commerce Clause deficiency in the prior Florida law occasioned by the *Bacchus* decision, it had failed to overcome the problem The trial court declared the exemption provisions of §564.06 and §565.12, Florida Statutes (1985) to be in violation of the Commerce Clause as interpreted by *Bacchus*, and made its ruling prospective in nature. From that order the Division of Alcoholic Beverage and Tobacco appeals.

McKESSON CORPORATION

McKesson Corporation did not serve its complaint until September 4, 1986. McKesson's complaint also challenged the tax provisions of §§564.06 and 565.12, Florida Statutes (1985) on several grounds under the Constitution of the United States and the Florida Constitution. DABT and the Comptroller of Florida (also named a defendant in this case) filed their answer on September 23, 1986, raising the defense of standing and the affirmative defense of the severability of the exemptions. McKesson's central contention is, likewise, that the tax exemptions discriminate against interstate commerce and in favor of Florida commerce. Immediately upon answering McKesson's complaint, Division of Alcoholic Beverages and Tobacco served requests for admissions, requests for production of documents and interrogatories going to the subject matter of McKesson's complaint and to DABT's defenses. R. ____, app. 218 - 247. DABT also noticed McKesson for deposition on November 6, 1986. R. ____, App. 248 - 250. McKesson objected to much of the discovery sought by DABT.[9] McKesson filed affidavits [10] and a

[9] In paragraph 10 of Defendants' First Request For Admissions, McKesson was asked to admit that during the period of time at issue it did not operate in Florida or elsewhere as a manufacturer of alcoholic beverages. As shown below that request was directly germane to DABT's defense that McKesson, a wholesale distributor, lacked standing since it demonstrated no injury

motion for partial summary judgment and preliminary injunction on October 16, 1986 and noticed the motion for hearing on November 12, 1986. On November 6, 1986 DABT took the deposition of McKesson. Despite the fact that the deposition was taken by designation under rule 1.310(6), *Fla. R. Civ. P.*, the designated spokesman for McKesson spent only two hours preparing to testify. Starzyk, p. 6, lines 7 - 13. The lack of preparation was obvious. For example, of central concern to DABT's standing defense was whether or not McKesson had truly suffered any competitive injury as a proximate result of the existence of the challenged tax preference. Yet, the deponent was unable to say whether McKesson sold more or less distilled spirits in the year succeeding the enactment of Ch. 85-203, 85-204, Laws of Florida, than in the year preceeding it.* Starzyk, p. 66, lines 15 - 19. One of the grounds of appeal in these cases is that the entry of summary judgment was error because of prematurity. The sequential and late filings of these actions, together with the lack of opportunity to complete discovery before hearings on the various

flowing from the existence of the exemptions it was seeking to challenge. McKesson objected to that request on October 28, 1986. R. ____, App. 235 - 247. Also on October 28, 1986, McKesson agreed to produce correspondence between it and Lafayette Vineyards and Winery, Ltd., Todhunter International, Inc. and Jacquin-Florida Distilling Co. regarding the distribution of those manufacturers' products by McKesson. Each of those manufacturers holds exemption certificates under the beverage excise tax law. The obvious purpose of the discovery request was to seek facts showing that McKesson, as a distributor, had access to the tax-preferred product lines and was therefore put to no competitive disadvantage by the existence of the tax preferences. On October 28, 1986, McKesson objected to the request but agreed to produce "any such documents" subject to "agreement of counsel regarding the time, place, manner and scope of production". R. ____, App. 228 - 234. The hearing on McKesson's motion for summary judgment was convened on November 12, 1986. Despite DABT's protest that discovery was not complete, the trial court overruled DABT's objection as to McKesson's standing and proceeded to the merits. In order its on (sic) McKesson's motion for partial summary judgment, the trial court found that McKesson had standing.

[10] DABT moved to strike portions of the affidavits and a Request For Judicial Notice filed by McKesson in support of the motion for summary judgment. The Trial court did not rule on those motions.

motions for summary judgment hampered development and presentation of the defense.

The affidavits, depositions and discovery and pleadings which are of record disclose the following facts: McKesson, like Tampa Crown and Florida Beverage, is licensed only as a wholesale distributor of alcoholic beverages in Florida. It does not operate as a manufacturer. Since July 1, 1985 McKesson has distributed beverages which do not benefit from exemption certificates under §§564.06, 565.12, Florida Statutes (1985). McKesson's products compete with products which do benefit from the exemptions. App. 199 - 202. McKesson asserts that it has suffered a significant loss in product sales as a result of §§564.06, 565.12, Florida Statutes (1985). That assertion is not without dispute in the record. McKesson's designated deponent testified that he never advised the company this his sales operations were suffering a loss because of the tax exemption. Starzyk, p. 118. Mr. Starzyk also testified that any sales loss was possibly attributed to a general decline in consumption habits. Starzyk, p. 72, line 23 - p. 73, line 3., p. 74, lines 1 - 8.

Alcoholic beverage manufacturers may use several grains, fruits and vegetables in the manufacture of alcohol for alcoholic beverages - including citrus, sugarcane and the grapes species listed in §564.06. In the United States, sugarcane is produced in Hawaii, Louisiana, and Texas. Sugarcane is also produced widely throughout the world - in Central America, South America, the Caribbean islands, Southeast Asia, Mexico and the Philippine Islands. App. 148 - 150, 191 - 198.

In the United States, citrus is produced in Arizona, California, Louisiana, Texas and Florida. It is also produced in Brazil, Japan, Spain, Italy, Mexico, Israel, India, Argentina and Egypt. R. ____, App. 142 - 147.

Other crops which may be used in the manufacture of alcoholic beverages - such as grains, corn and potatoes - grow widely in the United States and throughout the world. Many areas which grow such crops cannot grow sugarcane or citrus. R. ____, App. 191 - 198. McKesson Corporation, however, is not engaged in the farming of

any agricultural crop which may compete with citrus, sugarcane or the grape species for use in the manufacture of beverages from raw crops. It operates only as a wholesale distributor of alcoholic beverages. Starzyk, p. 40, line 15 - p. 43, line 25.

The trial court entered its partial summary judgment and preliminary injunction on March 20, 1987, from which this appeal ensues. Therein, the trial court held identically to its ruling in Tampa Crown and made its decision prospective.

BROWN-FORMAN CORPORATION

Brown-Forman did not tile its complaint until October 8, 1986. It was served October 9, 1986. Brown-Forman sought declaratory and permanent injunctive relief against the enforcement of §564.06, Florida Statutes (1985) on several constitutional grounds, including the Commerce Clause of the Constitution of the United States. R. ____, App. 19 - 28. On October 31, 1986, DABT served its answer, which included the defense that Brown-Forman lacked standing to cnallenge the provisions of §564.06(9), Florida Statutes (1985). Brown-Forman R. ____, App. 55-60. On October 31, 1986, Brown-Forman filed a motion for summary judgment. R. ____, App. 74 - 78. On November 5, 1986, Brown-Forman filed affidavits in support of its motion. R. ____, App. 203 - 207. The motion was heard on November 26, 1986.

The following facts appear of record. Brown-Forman is a manufacturer of wine coolers in California and sells such products to licensed wholesale distributors in Florida for resale in Florida. Brown-Forman also imports and sells to wholesale distributors in Florida certain Italian wines. The Italian wines which Brown-Forman imports are made from vinifera grapes, which do not qualify for exemption under §564.06(2), (3), (4), Florida Statutes (1985). The wine coolers which Brown-Forman makes are made predominantly from vinifera grapes. The grape species which will qualify a wine for exemption under §564.06, Florida Statutes (1985) can be grown in Italy and in California where Brown-Forman carries on its operations. R. ____, App. 136 -147. Commercial citrus production currently

occurs in California. R. ____, App. 136 - 141. Citrus is also produced commercially in Texas, Florida, Louisiana, Spain, Italy, Mexico, Israel, Argentina, and Egypt. The grape species enumerated in §564.06(2), (3), (4), Florida Statutes (1985) can be grown wherever vinifera grapes will grow. R. ____, app. 136 - 147. The California wine image is central to Brown-Forman's advertising of its wine cooler product. All of its wine coolers are packaged in California. R. ____, App. 205 - 206. The Brown-Forman asserts that for it to make the wine-cooler product from "any species" listed in §564.06, Florida Statutes would be prohibitively expensive. R. ____, App. 205 - 206. However, that fact is subject to dispute, since Brown-Forman stipulates that citrus is commercially grown in California, R. ____, App. 136 - 141 and citrus is one the agricultural species listed in §564.06(2), 10(b), Florida Statutes (1985). Further, the grape species listed in §564.06(2) are adapted to growth in many places, including California. There is no showing that Brown-Forman wishes to manufacture a wine cooler made from preferred products, nor that Brown-Forman could not manufacture a wine cooler in California by brining in concentrates of grape species, or other tax preferred products.

Brown-Forman applied to DABT for an exemption certificate under §564.06(2), (10)(b), Florida Statutes (1985) for its "California Cooler" product. The exemption was denied because the cooler is made from products not within the preferred class. Brown-Forman appealed that denial to the First District Court of Appeal, and raised in that appeal the constitutionality of §564.06, Florida Statutes. R. ____, App. 251 - 262. That appeal remains pending. DABT therefore moved that the trial court dismiss Brown-Forman's complaint inasmuch as Brown-Forman had elected its remedy and was precluded from litigating the same issue in circuit court. That motion was denied. R. ____, App. 267 - 272. The trial court entered its final judgment on March 20, 1987, from which this appeal was taken the same date. The final order declares the exemptions to be unconstitutional under the Commerce Clause as interpreted in the *Bacchus* decision and operates prospectively. The trial court did not reach the other constitutional issues raised by Brown-Forman. From that order DABT has brought an appeal.

QUESTIONS PRESENTED

I. WHETHER THE CLASSIFICATIONS OF PRODUCTS FOR FAVORABLE TAX TREATMENT IN §§ 564.06(2), (3), (4), (10) AND 565.12(1)(b), (2)(b), FLA. STAT. (1985) ARE FACIALLY PERMISSIBLE UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER THE CRITERIA FOR DISALLOWANCE OF PRODUCT EXEMPTIONS IN §§ 564.06(9), 565.12(1)(c), (2)(c), FLA. STAT. (1985) ARE FACIALLY PERMISSIBLE UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

III. WHETHER THE RECORD IS INADEQUATE TO SUPPORT SUMMARY JUDGMENT IN FAVOR OF APPELLEES ON AN AS-APPLIED ANALYSIS OF THE EFFECT OF THE TAX EXEMPTIONS UNDER THE COMMERCE CLAUSE.

IV. WHETHER THE TRIAL COURT ERRED IN ENTERTAINING AND GRANTING SUMMARY JUDGMENT TO APPELLEES PREMATURELY.

V. WHETHER THE TRIAL COURT ERRED IN REFUSING TO DISMISS BROWN-FORMAN CORPORATION'S COMPLAINT.

SUMMARY OF ARGUMENT

The trial court approached the case below as a purely facial challenge to the constitutionality of the provisions of §§564.06 and 565.12, Florida Statutes. It confined itself to the Commerce Clause ruling announced in *Bacchus*. *Bacchus* held only that a beverage tax preference which discriminated in favor of *locally produced* alcoholic beverages over beverages produced elsewhere violated the Commerce Clause. *Bacchus*, *Supra*, 104 S.Ct. at 3054, 3056, 3057.

The trial court's order does not make clear the basis of the court's ruling that the new Florida law failed to overcome the Commerce Clause concerns enunciated in *Bacchus*.

If the trial court meant the the Commerce Clause, as interpreted by *Bacchus*, prohibits Florida from classifying certain generic types of alcoholic beverages for different tax treatment than others, if the trial court's ruling was predicated upon Florida's classification of beverages made from sugarcane, citrus and certain grapes or concentrates or by-products thereof, *see* §§564.06(2), (3), (4); 565.12(1)(b), (2)(b), Fla. Stat.(1985), then DABT respectfully submits that the trial court erred. *Bacchus* does not forbid a state's exercise of its taxing power in a way that classifies some generic types of alcoholic beverages for tax treatment different from others; it does not stand for the idea that classifying certain types of alcoholic beverages for favorable tax treatment - without regard to the place of manufacture - constitutes discrimination against interstate commerce. *Bacchus* prohibits only a direct commercial advantage granted by the statute exclusively to local industry over foreign industry.

If the trial court's ruling is based on the premise that the agricultural product classifications in §§564.06(2), (3), (4) and 565.12(1)(b), (2)(b), Florida Statutes (1985) *per se* violate the Commerce Clause, then that ruling sweeps aside the broad leeway accorded to the states in tax classification matters in hundreds of decisions. It further fails to appreciate the distinction between the permissible promotion of local commerce which *affects* interstate commerce and discrimination purely in favor of local commerce, which is impermissible. No case cited by Plaintiffs below holds that the granting tax classification which favors certain types of agricultural products (or their concentrates or by-products) is forbidden by the Commerce Clause unless those products can be grown universally. Yet that is the proposition one must accept if one finds that the product exemptions for sugarcane, citrus and the grape species beverages, are *per se* in violation of the Commerce Clause. Sugarcane is not an agricultural crop which grows only in Florida. It is produced in many place throughout the world. Its by-products are shipped all over the globe for use in manufacture. The same is true of citrus. The grape species, as well, grow throughout

the Southeastern United States and will grow wherever vinifera grapes can be cultivated. Thus, it cannot be said that selecting beverages made from those products or their by-products or concentrates for favorable tax treatment constitutes a direct advantage exclusively to the produce of Florida. The provisions of §564.06(2), (3), (4) and §565.12(1)(b), (2)(b) - the product classifications - must be analyzed instead under the more lenient Commerce Clause balancing test. *E.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174(1970). Under that analysis, the trial court erred in granting summary judgment on this record to plaintiffs below. Moreover, no plaintiff below had standing to challenge the provisions of §565.12.

The trial court may have intended, instead, that the provisions which disallow the product exemptions in some cases - §§564.06(9), 565.12(1)(c), (2)(c) Florida Statutes (1985) - result in discrimination against interstate commerce. However, none of the plaintiffs below alleged or proved any harm to their business flowing from those provisions (hereinafter "the disqualification provisions"). They are therefore without standing to challenge those provisions. The case is not constitutionally ripe for decision on the disqualification provisions on this record. Moreover, the disqualification provisions do not facially discriminate against interstate commerce by protecting Florida markets from interstate competition. *See, e.g., Archer Daniels Midland Co. v. State*, 690 P.2d 177, 187 - 188 (1984). If there were a constitutional flaw in those provisions, it would have to be demonstrated under an as-applied analysis, which requires the adducing of evidence showing a practice and pattern of discrimination. There is no such evidence in these cases. In fact, there is evidence in the record that the provisions of §564.06(9) do not uniformly preclude manufacturers in other states from obtaining favorable tax treatment, and it was not established that a non-Florida beverage product made from sugarcane, citrus or the grape species, or by-products thereof, could not qualify by reason of §§564.06(9), 565.12(1)(c), (2)(c), Florida Statutes (1985).

Therefore, the court erred in granting summary judgment to appellees if the basis of its ruling was that the disqualification provisions contravene the Commerce Clause.

Moreover, the trial court erred in granting summary judgment in these cases without affording DABT adequate time and opportunity to conduct discovery and seek evidence.

POINT I

THE CLASSIFICATION OF PRODUCTS ELIGIBLE FOR FAVORABLE TAX TREATMENT IN §§564.06(2), (3), (4), (10) and 565.12(1)(b), (2)(b) DOES NOT FACIALLY DISCRIMINATE AGAINST INTERSTATE COMMERCE AND IS VALID UNDER THE BALANCING TEST

As noted above, the statutes are divisible into two parts for purposes of analysis here: The maximum or flat tax provisions [§§564.06(1), (3), (4); 565.12(1)(a), (2)(a)] and the exemption or tax preference provisions [§§564.06(2), (3), (4), (9), (10); 565.12(1)(b)(c), (2)(b)(c), (5), (6) Fla. Stat. (1985)]. The tax preference provisions are in turn divisible into two categories for purposes of analysis here: those creating classifications for granting preferential tax treatment to an alcoholic beverage product [§§564.06(2), (3), (4); 565.12(1)(b), (2)(b), Fla. Stat. (1985)] and those disqualifying an otherwise eligible beverage from receiving the tax preference [§§564.06(9), 565.12(1)(c), (2)(c), Fla. Stat. (1985)]. The trial court viewed the case below as presenting only a facial challenge to the statutes' constitutionality. There is obviously nothing offensive to the Commerce Clause in the flat tax provisions. The trial court so found and declared only the tax preference provisions to be invalid under the Commerce Clause. App. 274 - 283. The trial court did not enunciate its reasoning in finding a violation of the Commerce Clause among the tax preference provisions. However, reaching such a conclusion on a facial analysis of the tax preference provisions necessarily requires a determination that either the product classification or the disqualifying criteria are deficient.

On this record, the product classifications cannot be said to violate the Commerce Clause. There are basically two tests for a statute's validity under the Commerce Clause: a "per se" rule of invalidity in

cases where a statute on its face discriminates in favor of local commerce and against interstate commerce, and a more flexible balancing of interests test where there is no apparent facial discrimination. *Compare Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed. 2d 514(1977) *with Pike v Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed. 2d 174(1970), *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed. 2d 91(1978); *Archer Daniels Midland Co. v. State*, 690 P.2d. 177, 185 - 187 (Colo. 1984).

The product classification provisions do not constitute discrimination against interstate commerce and, therefore, are not subject to the "per se" test. The beverage which qualify under the product classification provisions are not limited to beverages produced from crops grown only in Florida nor to beverage bottled only Florida. §§564.06(2), (3), (4) and 565.12(1)(b), (2)(b) *Fla. Stat.* (1985). Instead, the classification is available to all beverages produced from sugarcane, citrus and the grape species wherever grown, and wherever the alcoholic beverages is (sic) manufactured and bottled. The classification is further available to beverages made from concentrates or by-products such as molasses, rather than beverages made from raw crops. The incentive in the Florida market for alcoholic beverages produced from such crops and by-products is available whether the beverage is made from crops grown in Florida or made from crops grown elsewhere and whether bottled in Florida or bottled elsewhere. Any manufacturer, regardless of where located and whatever his source of the beverage base, may take advantage of the tax preference.

The product classifications are thus clearly distinguished from statutes considered in the line of cases invalidating taxation or regulatory laws which had the effect of providing economic protection to a state's local produce and commerce. In each of those cases, the laws under scrutiny had the obvious effect of granting a financial advantage exclusively to commerce within the state, to the disadvantage of commerce from other states; that is, the local industry enjoyed a benefit which was unavailable to competing out-of-state industry. *E.g., Bacchus, supra*, at 104 S.Ct. 3057 (beverage tax exemption only to locally produced beverages); *Boston Stock*

Exchange v. State Tax Comm'n., 429 U.S 318, 97 S.Ct. 599, 607-608, 50 L.Ed. 2d 514 (1977)(tax reduction available only to transactions made on local stock exchange); *Miller v. Publiker Industries, Inc.*, 457 So. 2d 1374, 1375 (1984)(tax advantage only to gasahol made exclusively from ethanol produced from U.S. products). Those cases caution that their result "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry". *Boston Stock Exchange v. State Tax Comm'n, supra*, 97 S.Ct. at 610. *Accord, Bacchus Imports, Ltd.. v.. Dias, supra*, 104 S.Ct. at 3056. That permissible tax structuring is precisely what Florida has done with respect to the classification of beverages made from sugarcane, citrus, and the grape species and concentrates or by-products thereof for tax incentives. Those provisions do not allow economic incentives only to domestic Florida industries and therefore do not violate the Commerce Clause. The favorable tax classification is available to all alcoholic beverage manufacturers using specified agricultural products. The products are grown widely - though not universally - throughout the world. Concentrates and by-products, rather than raw products, may be used.

In order to hold that the product classifications, constitute discrimination against interstate commerce, one must accept the proposition that the Commerce Clause forbids granting tax preferences which benefit certain crops for use in manufacture unless those crops can be grown everywhere or unless all crops which might be used in making alcoholic beverages are treated the same. That is precisely the premise which Appellees advanced below. The centerpiece of their challenge to the classification provisions was that they purportedly discriminated, not against distributors or manufacturers of alcoholic beverages, but rather against growers of other agricultural crops which might be used in making alcoholic beverages in places where climate will not permit the growth of sugarcane and citrus.

That premise has several flaws. The most fundamental is that none of the Appellees are in the business of farming such agricultural crops. They thus are completely without standing to make that argument. They are not in competition for the marketing of raw agricultural products. They are makers and distributors of alcoholic beverages.

They thus may not be heard to complain of alleged injury to the interests of others. *E.g. Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 483, 80 L.Ed. 688 (Brandeis J. concurring); *Eastern Air Lines, Inc. v. Department of Revenue*, 455 S. 2d 311, 317 (Fla. 1984).

Even if that doctrinal bar is ignored, the premise is fatally flawed. It is flawed because it tacitly depends upon the idea that the State must classify all alcoholic beverages together in order to comply with the Commerce Clause. That is demonstrably incorrect. It is elemental that in the field of taxation the States possess great latitude in making classifications. *E.g., Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590(1940): *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 21 S.Ct. 43, 46, 45 L.Ed. 102 (1900). *Eastern Air Lines, Inc. v. Department of Revenue, supra*; *Archer Daniels Midland Co. v. State, supra*. They may, for instance, classify airline transportation differently from rail and water transportation. *Eastern Airlines, Inc.. v. Department of Revenue, supra*.. They may classify small firms in the gasahol (sic) business differently from large firms in the same business without offending the Commerce Clause. *Archer Daniels Midland Co. v. State, supra*. They may do so although interstate commerce is thereby *affected*, so long as the class in not drawn so as to favor local commerce exclusively over interstate commerce. *Id.*

The flaw in Appellees' position is that it equates every tax differential or regulatory mechanism which affects interstate commerce with discrimination against interstate commerce. It reduces to the argument that any action which in any way affects the "free market" balance of competition between industries in different states is forbidden discrimination. That argument proves too much. First, regulation by a state aimed at bolstering the position of its local industry has been upheld, although it affects interstate trade in the process. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315(1943). *See also Archer Daniels Midland Co. v. State, supra.* Second, when the court cautioned in the *Boston Stock Exchange* case that states were not prevented by the Commerce Clause from "structuring their tax systems to encourage the growth of intrastate

commerce...", 97 S.Ct. 599 at 610, it was necessarily contemplating tax differentials which would tend to strengthen or encourage general commerce to which the state is adapted, so long as the differential does not favor local commerce exclusively. Third, if Appellees' position were correct, it would prevent the States from granting any tax incentive, no matter how local the concern giving rise to it. Under appellees' theory, Florida could not grant special tax classification to agriculture, because that might put Florida farmers in a better competitive position relative to farmers in a sister state. It is illogical to conclude that a State may directly enhance the market power of local industry by keeping prices up, yet may not grant tax incentives aimed at increasing production and use of certain articles generally, to a state's ultimate benefit.

This Court should hold that Florida's classification of products for favorable tax treatment does not constitute discrimination against interstate commerce, because those provisions are facially neutral and do not grant an advantage producers to (sic) Florida over producers of citrus, sugarcane and grapes in other state (sic), nor to Florida manufactures of alcoholic beverages made from those crops.

The provisions of §564.06(2), (3), (4) and §565.12(1)(b), (2)(b), are thus properly analyzed under the balancing-of-interest test. E.g.,*Pike v Bruce Church, Inc., supra; Parker v. Brown, supra; Archer Daniels Midland Co. v. State, supra.*

The product classifications easily pass muster under that test. They are rationally related to the legitimate state interest of enhancing the flagging receptivity of consumers to alcoholic beverage products made from crops which Florida is adapted to growing. Without question, those provisions may affect commerce by increasing the use of sugarcane and citrus in the manufacture of beverages. But that effect is not a violation of the Commerce Clause. The fact that some crops used in the interstate production of alcohol may be displaced by other crops grown and sold in the interstate market does not constitute an undue burden on interstate commerce. *See Archer Daniels Midland Co. v. State, supra; See also Minnesota v. Clover Leaf Creamery* Co., 449 U.S. 456, 601 S.Ct. 715, 66 L.Ed. 2d 715(1981). Nor is a

temporary displacement due to market adjustment an impermissible burden on commerce. *Id.*

POINT II

THE CRITERIA FOR DISALLOWANCE OF PRODUCT EXEMPTIONS IN §§564.06(9) AND 565.12(1)(C), (2)(C) DO NOT FACIALLY DISCRIMINATE AGAINST INTERSTATE COMMERCE AND ARE VALID UNDER THE BALANCING TEST

The trial court may have intended that the disqualification provisions, rather than the product classification provisions, caused a Commerce Clause problem with the tax preferences. However, a facial analysis of the disqualification provisions fails to support such a ruling and this record is insufficient to support summary judgment on an as-applied theory. *See* Point III, *infra.*

The disqualification provisions do not facially discriminate against interstate commerce. They do not impose a burden on interstate alcoholic beverage manufacturers as a class. Just as in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed. 2d 91 (1978) and *Archer Daniels Midland Co. v. State, supra;* on the face of these statutes it is equally likely that any shift in Florida's market would be from one foreign manufacturer to another as from foreign manufacturers to Florida manufacturers. The trial court erred, therefore, if its ruling is construed as striking down the tax preference under a "per se" analysis.

Nor does a facial analysis of the disqualification provisions under the balancing test support the trial court's summary judgment.

It must be remember that the price for encouraging use of the use (sic) of sugarcane, citrus and the grape species in alcoholic beverage production is the loss of tax revenues needed by the State. The legislature thus made the policy decision, embodied in the disqualification provisions, that it was not in the public interest to trade tax dollars for encouragement of industry in cases where alcoholic beverages were already benefitting from incentives in the

manufacturing jurisdiction. The rationality of that policy choice is clear: Why pay in lost taxes to accomplish an objective in cases where it is being fostered already? The local benefit is the preservation of the local tax base. The burden on interstate commerce has not been shown by Appellees to be significant. *See Archer Daniels Midland Co. v. State, supra,* at 187. There is no allegation in these cases, let alone conclusive proof, that the disqualification provisions would bar the sugarcane or citrus products of manufacturers for which Tampa Crown, Florida Beverage and McKesson distribute from taking advantage of the tax preference or that they would bar Brown-Forman's products. On the other hand there is evidence which shows that the disqualification provisions would not bar the wine manufacturers of Virginia from taking advantage of the tax preference. Thus, the statute cannot be said to be facially invalid. *Voce v. State*, 457 So. 2d 541(Fla. 4th DCA 1984).

POINT III

THE LOWER COURT DID NOT ENTERTAIN AN AS-APPLIED CHALLENGE AND THE RECORD WOULD NOT SUPPORT SUMMARY JUDGMENT UNDER AN AS-APPLIED ANALYSIS

The trial court explicitly declined to treat the appellees' challenges to the statutes under an as-applied analysis. Yet, at bottom, that is precisely the sort of argument upon which Appellees heavily relied below. However, these cases were so rushed to judgement by Appellees that the record is wholly inadequate to support summary judgment if bottomed on the theory that the statutes' practical effect constitutes discrimination although they do not do so on the face of the matter.

It bears repeating that only Brown-Forman is a manufacturer of alcoholic beverages. The remaining Appellees function as wholesale distributors. They buy beverages of all types from various manufacturers and resell them to retail outlets. Nowhere in the complaints filed by Tampa Crown, Florida Beverage and McKesson is there any allegation that they do not distribute citrus-or-sugarcane-based beverages. Indeed the record shows that they do. Nowhere in

the complaints of Tampa Crown, Florida Beverage or McKesson is there any allegation that the manufacturers, whose sugarcane products or citrus products they distribute, have applied for an exemption license and been denied it by reason of the disqualification provisions. Nowhere in the record is there any allegation or proof that Tampa Crown, Florida Beverage or McKesson is barred from distributing products of manufacturers which do hold exemption certificates. In fact, this record affirmatively shows that Florida Beverage deals in and distributes wines and distilled spirits which receive tax preferences. This record affirmatively show that Tampa Crown refuses to deal in products which currently receive tax preferences, not because the law on its face or in practical operation prevents it, but because the law on its face or in practical operation prevents it, but because Tampa Crown chooses otherwise. Thus, the factual inferences in this record are wholly in conflict with the conclusion that the statutes in practical effect discriminate against the business of wholesale liquor distributors.

We are left, then, with the contentions of the one manufacturer in these cases: Brown-Forman. The record shows that Brown-Forman applied, as a manufacturer, for tax preference on its wine cooler product know as "California Cooler". Tax preference was denied; but it was denied because the product was made from crops not classified for tax preference, not because of the disqualification provisions of section 564.06(9), Florida Statutes. R. ____, App. 251 - 262. Thus there is no evidence in this record from which the trial court could have concluded that the practical effect of the disqualification provisions is to discriminate against interstate commerce and to grant a direct competitive advantage tc Florida agricultural producers or beverage manufacturers, let alone sufficient evidence to conclude that there is no material fact in dispute on that issue. Moreover there is conflict in this record as to whether Brown-Forman could indeed benefit from the product exemption.

POINT IV

THE GRANTING OF SUMMARY JUDGEMENT WAS ERROR SINCE APPELANT (SIC) WAS NOT PROVIDED AN ADEQUATE OPPORTUNITY TO COMPLETE DISCOVERY AND MARSHAL EVIDENCE

It is reversible error for the trial courts to award summary judgment when a party, through no fault of its own, has not completed discovery. *E.g., Moore v. Freeman*, 396 So.2d. 276 (Fla. 3d DCA 1981); *Commercial Bank of Kendall v. Heinman*, 322 So.2d 564 (Fla. 3d DCA 1975).

The cases below were filed sequentially. The summary judgment hearings where conducted in McKesson and in Brown-Forman within 70 and 48 days, respectively, of the filing of their complaints. The trial court never consolidated the cases, but treated them informally as though they were consolidated. That approach is understandable, given the Court's announced intention to entertain the cases only on a facial analysis of the statutes' text. It worked to the prejudice of DABT, however, under the circumstances.

DABT raised a challenge below to the standing of Tampa Crown, Florida Beverage and McKesson. DABT asserted that those parties lacked taxpayer standing, since they could not gain as taxpayers by the striking of the exemptions, and since the economic burden of the beverage tax was passed on to their customers. DABT asserted that those parties had no standing to challenge the exemptions based upon economic injury, because their business as distributors were not harmed by the exemptions. Finally DABT asserted as to Tampa Crown, Florida Beverage and McKesson, that they lacked standing to challenge the disqualification provisions of the statutes. Those defenses were at issue and are supported by both Florida and federal precedents. *E.g., Ashwander v. Tennessee Valley Authority, supra* (courts will not consider constitutionality of a statute on complaint of one not injured by its operation); *Dimond v. District of Columbia*, 618 F. Supp. 519, 524 (D.C.D.C. 1984) rev'd in part on other grounds,

792 F.2d. 179 (D.C. Cir. 1986)(standing to challenge portions of a statute does not confer standing to challenge other portions without proof that those portions injure plaintiff); *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So.2d. 311 (Fla. 1984).[11] Nor are those defenses academic; for, if proven, no party below would have standing to challenge §565.12, Florida Statutes.

DABT embarked upon discovery to show that, for example, McKesson had passed on the financial burden of the tax and was not injured, as an alcoholic beverage distributor, by reason of the operation of the exemptions. Nearly all of DABT's discovery in that regard was frustrated by objections from McKesson, and inadequate time was available to prepare and present motions to compel, much less to obtain the requested discovery, prior to the court's entertaining motions for summary judgment.

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[11] *Bacchus v. Dias* is not conclusive of the standing issue. The Hawaii statute challenged in *Bacchus* granted an automatic exemption for locally produced alcoholic beverage products. Unlike Hawaii's law, the Florida statutes do not create an automatic exemption. Florida requires that a *manufacturer* take affirmative action to obtain the exemption for its products and grants the exemption to a *manufacturers* product. Further, Florida's statute does not limit the availability of the exemption to locally produced beverages. Insofar as Appellees attempt to litigate as surrogates for manufacturers' interests, there is a ripeness problem in this case which was not before the court in *Bacchus*. Appellees did not prove that Florida's statutes uniformly prohibit all out-of-state manufacturers form obtaining product exemptions. If any manufacturer may obtain the product exemptions, then the statutes are facially valid, *Voce v. State*, 457 So.2d. 541 (Fla. 4th DCA 1984), and Appellees' claims, as surrogates for such manufacturers, are "as-applied" challenges. Such challenges are not ripe for judicial review until application for the licenses has been made and the licenses have been denied. *Division of Alcoholic Beverages & Tobacco v. Ashbury*, 460 So.2d 1026 (Fla. 4th DCA 1984); *Florida Bar Owners, Inc. v. Department of Business Regulation*, 440 So.2d 15 (Fla. 1st DCA 1983); *Grady v. Department of Professional & Occupational Regulation*, 402 So.2d 438 (Fla.3d. DCA 1981). Moreover, the standing issue in *Bacchus* was raised for the first time on appeal. There was no consideration given to whether the wholesale distributors in that case would have had standing if, as taxpayers, they passed the tax on and, as distributors, they suffered no injury from the operation of the exemptions.

On the merits, with the little time available, DABT did manage to establish that sugarcane and citrus are widely grown, and are not anywhere near to being crops exclusive to Florida. DABT did *not* have the opportunity to pursue other factual matters which would bear directly upon the validity of the tax exemptions under the balancing test. For example, Brown-Forman asserted that using the grape species to make its wine coolers would be prohibitively expensive, since the grapes are not presently grown in California. Lines of inquiry remained open as to that assertion: (1) Does Brown-Forman want to use the tax-preferred substances in the coolers it makes? (2) If so, what prevents Brown-Forman from bringing into California the grapes or citrus in concentrated form? (3) What prohibits Brown-Forman from using wine from citrus, which abounds in California? (4) Can the grape concentrates not be shipped economically, as orange juice concentrate now is, for use in manufacture(?) Further, proof that citrus concentrate and molasses are, in present practice, shipped throughout the nation in a economical fashion which permits its use in further processing would surely be relevant on the issue of whether the classification of citrus and sugarcane for favorable tax treatment constitutes an excessive burden on commerce. Yet DABT was foreclosed from pursuing those lines of inquiry by the premature consideration of Appellees' summary judgement motions, complicated by the multiplicity of issues raised by the various complaints filed.

As a result, each Appellee had the opportunity to carefully prepare its position prior to filing suit. DABT, however, was rushed to judgment on complex issues with inadequate time to pursue discovery on relevant factual issues.

DABT respectfully submits that granting summary judgment to Appellees in these circumstances was prejudicial error and reversal is in order.

POINT V

THE TRIAL COURT ERRED BY REFUSING TO DISMISS THE COMPLAINT OF BROWN-FORMAN CORPORATION

DABT moved the trial court to dismiss Brown-Forman's complaint because Brown-Forman, prior to the institution of this action, had chosen to appeal the denial of its exemption certificate application regarding the "California Cooler" to the First District Court of Appeal and was therefore precluded from litigating the same issue simultaneously in circuit court. The trial court denied that motion. R. ____, App. 267 - 272.

The Court's ruling on DABT's motion to dismiss is directly in conflict with this Court's decision in *Keyhaven Associated Enterprises, Inc. v. Board of Trustees*, 427 So.2d. 153 (Fla. 1982). Brown-Forman, having chosen to challenge the constitutionality of §564.06 in the District Court on direct review under §120.68, Florida Statutes, is foreclosed from proceeding here to raise the challenges.

CONCLUSION

For the foregoing reasons DABT requests the the(sic) Court hold that the provisions of §§564.06(2), (3), (4), (10) and 565.12(1)(b), (2)(b), Florida Statutes (1985), do not constitute a facial violation of the Commerce Clause of the United States Constitution; hold that the provisions of §§564.06(9), 565.12(1)(c), (2)(c) Florida Statutes (1985), do not constitute a facial violation of that clause; hold that this record will not support summary judgment in favor of Appellees under an as-applied analysis of the statutes; and reverse the trial court's entry of summary judgment and partial summary judgment. In addition, DABT requests the Court to hold that entry of summary judgment in these cases was premature and therefore in error. As to Brown-Forman, DABT requests that the Court

reverse and remand with instructions to dismiss the complaint below.

Respectfully Submitted,

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SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 70,368

(Caption omitted in printing)

On Appeal from the District Court of Appeal,
First District, State of Florida, Case No. BS-402

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Authorities omitted in printing)

PRELIMINARY STATEMENT

Appellants filed an Appendix to their Brief in light of the inability of the Clerk of Court for the Circuit Court of the Second Judicial Circuit, In and For Leon County, Florida, to prepare a timely Record on Appeal, and cited to that Appendix in lieu of a Record. Appellee McKesson Corporation has also filed an Appendix for the same reason. McKesson's Appendix incorporates Appellants' Appendix and supplements their Appendix with additional documents. Thus, Appellee's Appendix, which retains Appellants' initial numbering, includes all Appellants' and Appellee's references. Appellee will cite in its Brief to documents in the Appendix: (A.___.)

STATEMENT OF THE CASE AND OF THE FACTS

Introduction

Plaintiff-Appellee-Cross-Appellant McKesson Corporation ("McKesson"), which is a distributor of alcoholic beverages in Florida, challenges the constitutionality of sections 564.06 and 565.12, Florida Statutes (1985), which impose taxes on the distribution of alcoholic beverages.

McKesson maintains that the Florida statutes discriminate against interstate and foreign commerce in violation of the federal Constitution's Commerce Clause and Import-Export Clause and also encroach upon the federal government's exclusive power over foreign affairs.

McKesson submits this statement of the case and the facts because appellants' statements are incomplete.

The Revised Florida Products Exemption

Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), which declared a Hawaii liquor tax exemption for local products unconstitutional under the Commerce Clause, Florida's alcoholic beverage laws granted an excise tax exemption to beverages

manufactured and bottled in Florida from Florida products. (A. 1-3.) The similarity between the Florida law, sections 564.06 and 565.12, Florida Statutes (Supp. 1984) ("Florida Products Exemption"), and the unconstitutional Hawaii law prompted the Florida legislature to alter the language of the statute. (A. 386-485.)

During the 1985 Florida legislative session, the legislature enacted the Committee Substitute for House Bill 521, Florida Session Laws 85-203, and Committee Substitute for House Bill 530, Florida Session Laws 85-204, both effective July 1, 1985, which became sections 564.06 and 565.12, Florida Statues (1985) ("Revised Florida Products Exemption"). The legislature removed the word "Florida" from the sections and substituted language identifying certain agricultural products whose use would entitle the manufacturers and distributors to a tax break. The sections, one for wines, section 564.06, and one for distilled spirits, section 565.12, divide into three relevant parts. (A. 4-7A.)

First, the sections impose a per gallon tax on the alcoholic beverages that relates to the percentage of alcohol.

Second, the sections provide a tax exemption for wines and a tax preference for distilled spirits when the alcoholic content of the beverages is manufactured exclusively from certain designated products. The Florida statutes' designated products are all Florida products.

Florida, which cannot produce the grape species that grape producers generally produce for that manufacture of wine and wine coolers, *Vitis Vinifera*, has designated for preferential treatment the six grape species that Florida does produce for the manufacture of wine and wine coolers, *Vitis Rotundifolia, Vitis Aestivalis ssp. Simpsoni, Vitis Aestivalis ssp. Smalliana, Vitis Shuttleworthii,Vitis Munsoniana, and Vitis Berlandieri*). (A. 370-71.)

Florida, which is one of the few states to produce citrus and is the predominant producer of citrus, has designated for preferential treatment citrus fruits, citrus products and citrus byproducts.

(A. 375.) Florida, which is also one of the few states to produce sugarcane and is the leader in production of sugarcane, has designated for preferential treatment sugarcane and sugarcane byproducts. (A. 375.)

Third, the sections authorize the Division of Alcoholic Beverages and Tobacco to review the laws and programs of the applicant's home state or country to determine whether the state or country grants the applicant any economic advantage and to apply a set of provisions to take back the tax exemption or tax reduction ("Take Back Provisions"). §§ 564.06 and 565.12, Fla. Stat. (1985).

McKesson's Action

McKesson does business in Florida as McKesson Wine & Spirits Co., Miami Crown Distributors, and Palm Beach Crown Distributors. (A. 365-66.) McKesson, which is licensed under section 561.14, Florida Statutes (1985), has distributed domestic and imported alcoholic beverages at wholesale and has paid excise taxes on alcoholic beverages under sections 564.06 and 565.12, Florida Statutes (1985). (A. 365-66.)

On September 3, 1986, McKesson filed a Complaint in the Circuit Court, Second Judicial Circuit, Leon County, against the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and the Office of the Comptroller (together, "the State"), challenging Florida's alcoholic beverage tax as unconstitutional under the federal and state constitutions. (A. 30-60.) Jacquin-Florida Distilling Co., Inc. ("Jacquin") and Todhunter International, Inc. ("Todhunter"), two Florida manufacturers who profit from the Florida statutes' protectionist effect, intervened as defendants. (A. 302-04.)

McKesson in its Complaint prays that the Court declare that the Florida statutes violate the United States and Florida Constitutions and, accordingly, are void and unenforceable. McKesson also prays for a refund of taxes. (A. 30-40.)

On October 17, 1986, McKesson filed motions for partial summary judgment and for a preliminary injunction. (A. 306-492.) McKesson argued that: sections 564.06 and 565.12, Florida Statutes (1985) impermissibly discriminate against interstate and foreign commerce in violation of the Commerce Clause; impermissibly involve Florida in foreign affairs and international relations; and the sections impermissibly discriminate against foreign imports in violation of the Import-Export Clause. (A. 306-492.)

On November 12 and 26, 1986, Judge Charles E. Miner, Jr. of the Circuit Court heard arguments. On March 20, 1987, the Court entered an Order that found that McKesson has standing to challenge the constitutionality of the tax statutes and that declared unconstitutional those portions of the statutes that grant tax exemptions or preferences. The Court's Order included a preliminary injunction that enjoined the State from enforcing the unconstitutional statutory provisions. The Court stated that its declaration of unconstitutionality would operate only prospectively. (A. 278-80)

On the same day, March 20, 1987, the State filed a Notice of Appeal, which automatically caused a stay of the Circuit Court's Order under Fla. R. App. P. 9.310(b)(2). (A. 285.) On April 15, 1987, McKesson filed its notice of cross appeal. (A. 561-62.) McKesson in its cross appeal challenges the Circuit Court's decision to restrict its declaration of unconstitutionality and thereby bar retroactive relief to McKesson.

On April 13, 1987, the District Court of Appeal, First District, certified that the case on appeal is of great public importance requiring immediate resolution by the Florida Supreme Court. On April 22, 1987, this Court accepted jurisdiction.

QUESTIONS PRESENTED

I. WHETHER MCKESSON HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

II. WHETHER THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S COMMERCE CLAUSE.

III. WHETHER THE REVISED FLORIDA PRODUCTS EXEMPTION INTRUDES IMPERMISSIBLY INTO THE EXCLUSIVELY FEDERAL AREA OF FOREIGN AFFAIRS.

IV. WHETHER THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S IMPORT-EXPORT CLAUSE.

V. WHETHER THE CIRCUIT COURT PROPERLY ENTERTAINED MCKESSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

VI. WHETHER, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, AS WELL AS FLORIDA LAW, MCKESSON IS ENTITLED TO A REFUND OF THE DIFFERENCE BETWEEN THE TAXES ON MCKESSON'S DISFAVORED PRODUCTS AND THE TAXES ON OTHERS' UNCONSTITUTIONALLY FAVORED PRODUCTS.

SUMMARY OF ARGUMENT

Under the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), McKesson has standing to challenge the constitutionality of the Revised Florida Products Exemption. McKesson, as an alcoholic beverage distributor, has paid excise taxes on its products to the State under the challenged statutes. Further, Florida's enforcement of the tax has adversely affected McKesson's property rights.

McKesson maintains that the Circuit Court correctly determined that the Revise Florida Products Exemption violates the United States Constitution's Commerce Clause.

The United States Supreme Court has declared that state statutes that either reveal a discriminatory purpose or cause a discriminatory effect are virtually *per se* invalid under the Commerce Clause. The Court has squarely established that the Commerce Clause forbids discrimination, whether forthright or ingenious. Therefore, this Court has a a federal constitutional obligation to determine the legislature's true purpose in enacting the Revised Florida Products Exemption and, also, to determine whether the statutes, in their practical effect, discriminate against interstate commerce.

The Revised Florida Products Exemption's protectionist purpose makes the statutes unconstitutional. This Court's analysis of the statutes and their history will reveal that the Florida legislature intentionally designed the statutes to continue Florida's historic alcoholic beverage tax policies of protecting Florida products and industry. Appellants cannot contradict the evidence from the legislative history that the legislature sought to circumvent the holding in *Bacchus* and preserve the former Florida Products Exemption's protectionist effect.

The Revised Florida Products Exemption's practical effect -- a discrimination against interstate commerce -- also makes the statutes unconstitutional. The Florida statutes effectively tax the alcoholic beverage products from Florida and a few other states and countries at one rate and tax the products from the remaining state and countries at a higher rate. Although Florida may enact laws to encourage local industry, Florida may not protect local industry by imposing a discriminatory burden upon other states' and countries' industry. The Revised Florida Products Exemption imposes a discriminatory burden upon all other states and countries whose geography and climate do not permit them to produce the favored agricultural products. Moreover, the statutes' Take Back Provisions permit the State to discriminate further against interstate commerce by preventing out-of-

state manufacturers and distributors who use the Florida agricultural products from receiving the tax breaks.

Even if the Revised Florida Products Exemption did not have a protectionist purpose and effect and, thus, were not *per se* unconstitutional, the statutes still would violate the Commerce Clause because they impose an excessive burden on interstate commerce. The United States Supreme Court has noted that the Commerce Clause does not bar state legislation that affects interstate commerce only incidentally, that advances legitimate local interests, and employs the leas burdensome alternative. However, the Revised Florida Products Exemption does not survive scrutiny under this standard. First, the statutes do not directly affect only local commerce and, thus, only incidentally affect interstate commerce. Rather, the tax scheme directly burdens out-of-state producers who do not grow the Florida products. Second, the statutes advance the illegitimate purpose of encouraging the sale of Florida products at the expense of non-Florida products. Third, the statutes do not employ the least burdensome alternative. Florida can effectively promote its industry without violating the Commerce Clause.

McKesson also maintains that the Revised Florida Products Exemption impermissibly involves Florida in foreign affairs and international relations. The Florida statutes' Take Back Provisions disrupt the federal government's exclusive jurisdiction over foreign affairs by requiring Florida to make determinations concerning other countries' activities. The statutes permit Florida to obstruct various federal trade programs. The Florida statutes interfere with the federal government's resolution of delicate international trade issues.

McKesson also maintains that the Revised Florida Products Exemption impermissibly discriminates against foreign imports and, thus, violates the United States Constitution's Import-Export Clause. The Florida statutes effectively impose a duty upon imports by discriminating against other countries' products and, under the Take Back Provisions, by authorizing the denial of tax preferences to foreign products based on their place of origin.

The Circuit Court properly entertained McKesson's motion for partial summary judgment. The Circuit Court realized that although the State suggested the existence of factual controversies, McKesson and the State did not disagree on the fundamental constitutional facts concerning the Revised Florida Products Exemption. The Circuit court properly concluded that the State had not, and could not, present a controversy on any genuine issue of material fact.

McKesson is entitled to an appropriate tax refund as a remedy for its constitutional injury as a result of Florida's discrimination. Florida law authorizes McKesson's recovery of taxes. The Circuit Court improperly barred retroactive relief to McKesson, which has timely pursued its challenge to the statutes.

ARGUMENT

I. McKESSON HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE REVISED FLORIDA PRODUCTS EXEMPTION.

McKesson has standing to challenge the constitutionality of the Revised Florida Products Exemption under the federal Constitution.

The United States Supreme Court, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), established that a liquor wholesaler has standing to challenge the constitutionality of a state liquor excise tax upon the wholesaler's products. The Court in *Bacchus* held that when a wholesaler must pay the tax on its products to the state, the wholesaler has standing to challenge the tax. *Id.* at 267.

This Court, in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), adopted a similar expansive view of standing in a case challenging the constitutionality of a Florida gasohol tax scheme. This Court held that a plaintiff has standing to challenge the constitutionality of a tax statute if enforcement of the statute adversely affects the plaintiff's personal ar property rights, even if the plaintiff is not liable for the tax. *Id.* at 1375-76.

Under *Bacchus* and *Publicker*, McKesson plainly has standing to challenge the constitutionality of the Florida statutes. McKesson, as a distributor of alcoholic beverages, is liable for the tax. (A. 356-66.) Under sections 564.06 and 565.12, Florida Statutes (1985), McKesson, as a distributor has paid the excise taxes on its products to the State whether its customers have paid for products or not. (A. 366.) Moreover, McKesson's products, which did not receive the tax exemptions and preferences, have competed with other distributors' products, which did receive the tax exemptions and preferences. (A. 366-68.) As a result, McKesson has suffered economic losses. (A. 368.) Consequently, Florida's enforcement of the tax has adversely affected McKesson's property rights.

Appellants' attempts to question McKesson's standing in this case ignore the Supreme Court's decision in *Bacchus*.

Appellants argue that McKesson does not have standing to challenge the tax statutes either because McKesson is not a producer of agricultural products or because McKesson is not a manufacturer of alcoholic beverages. However, in *Bacchus*, in which McKesson was a plaintiff, the Supreme court acknowledged McKesson's standing to challenge suspect tax statutes even though the company did not claim to be either a producer or a manufacturer. *Bacchus Imports, Ltd. v. Diaz*, [sic] 468 U.S. 263, 266-67 (1984). A distributor who pays the unconstitutional taxes may attack the constitutionality of a state's attempt to favor its own parochial interests. *Id.* at 267.

Appellants also contend that McKesson does not have standing to challenge the tax statute because it could receive the tax exemptions and preferences by selling the favored products. The majority in *Bacchus Imports, Ltd. v. Diaz*, [sic] 468 U.S. 263 (1984), rejected a similar argument suggested by the dissent. The Supreme Court ruled that the taxpayer who sells disfavored products has the financial interest to litigate the constitutionality of a state's statutes.[1]

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[1] Even if appellants' argument that McKesson must establish that its distribution of products implicates the Take Back Provisions were accurate, McKesson, in fact, does distribute products that would qualify for the Revised Florida Products Exemption's tax preference but for its Take Back Provisions. McKesson distributes Mt. Gay Rum from Barbados. (A. 367-68.) Mt. Gay Rum, a sugarcane product, would qualify for the tax preference under section 565.12 (1)(b), Florida Statutes (1985), but for the Take Back Provisions.

Barbados, as a beneficiary country under the terms of the Caribbean Basin Economic Recovery Act, 19 U.S.C.A. § 2702 (West Supp. 1986), and Presidential Proclamation 5133 of November 30, 1983, receives trade benefits from the United States for its alcoholic beverages. Under the Act, Barbados cooperates with the United States in administering the trade benefits. *See* 19 U.S.C.A. § 2702 (c)(11). In addition, a Barbados government agency, the Barbados Export Promotion Corporation, provides economic advantages to Barbados rum manufacturers. Therefore, under the Take Back Provisions, McKesson's Mt. Gay Rum from Barbados, which would otherwise qualify for a tax preference, is ineligible to receive Florida's unconstitutional tax break.

II. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S COMMERCE CLAUSE.

The Commerce Clause enforces our overriding national interest in free, unrestricted trade among the states through a national common market. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977). The Commerce Clause federalizes regulation of foreign and interstate commerce and restricts internecine actions among the states. *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34, 69 S.Ct. 657, 93 L.Ed. 865 (1949). Thus, each state cannot " 'legislate according to its estimate of its own interests [and] the importance of its own products.' " *Id.* at 533 (quoting Story, *The Constitution*, §§ 259, 260.)

The United States Supreme Court has adopted a two-tiered approach in reviewing Commerce Clause cases. Where state legislation effects economic protectionism, the Court has declared a "virtually *per se* rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). Where state legislation advancing legitimate local interests affects interstate commerce only incidentally, and employs the least burdensome alternative, the Court will permit the law. *Id.*

The Revised Florida Products Exemption's scheme of tax exemptions and preferences fails on both levels of analysis.[2] Florida's attempt to protect its local commerce at the expense of interstate competition offends the cardinal rule of Commerce Clause jurisprudence that no state may erect a tax scheme that provides a direct commercial advantage to local business by discriminating against interstate commerce. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984). The Commerce Clause does not allow Florida to advance its parochial interests at our national economy's expense.

A. The Revised Florida Products Exemption Constitutes Economic Protectionism and, Therefore, is Unconstitutional.

This Court may find economic protectionism either in discriminatory purpose or in discriminatory effect. Either condition is sufficient to condemn a statute. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 270. The "evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey*, 437 U.S. at 626. The Florida legislation is demonstrably protectionist and discriminatory in both its purpose and its effect.

1. The Florida Legislature Designed the Florida Laws to Protect Florida Commerce from Interstate Competition.

This Court must examine the Florida statues for discriminatory purpose. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270

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[2] Appellants' suggestion that the Constitution's Twenty-first Amendment, which allows Florida to regulate the consumption of alcoholic beverages within the state, is a "factor" in this case is frivolous. Appellants acknowledge repeatedly that the Florida legislature passed the Revised Florida Products Exemption in order to increase the consumption of alcoholic beverages that use Florida's products. The supreme Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), concluded that the Amendment did not save Hawaii's discriminatory tax scheme, noted that the "central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *See also Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. ___, 106 S.Ct. 2080, 90 L.Ed.2d 552, 563-64 (1986).

(1984); *Philadelphia v. New Jersey*, 437 U.S. at 626. Thus, as a matter of federal constitutional law, this Court must consider not only the Florida statutes' language but also their legislative history to determine the Florida legislature's true purpose in enacting the statutes.[3]

The United States Supreme Court, in reviewing challenges to state statutes on Commerce Clause grounds, has focused on legislative history to identify the state legislature's intent. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 141-42, n.8, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (opinion of Blackmun, J., concurring in part and dissenting in part) (state Senate committee testimony supported the inference that the legislature had passed a challenged provision in response to the pleas of local businesses seeking protection from competition); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 325-28 (1977) (legislative history established the purpose of a New York law in Commerce Clause challenge).

Moreover, the Supreme Court in Commerce Clause cases has indicated that courts cannot restrict their review of state statutes to the language of the statute. As the Court stated in *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 61 S.Ct. 334, 85 L.Ed. 275 (1940), "[t]he Commerce Clause forbids discrimination, whether forthright or ingenious." Thus, even if the Florida statutes' language appeared non-discriminatory, this Court would need to explore the legislative history to determine the legislature's true purpose. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 325-328 (1977) (legislative history, including a governor's statements, may establish legislative purpose); *cf. Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (legislative history is a source for determining whether an ostensibly neutral statute is racially discriminatory).

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[3] Contrary to Appellants' suggestion, McKesson is not invoking legislative history to illuminate the statutes' construction, but rather to reveal the legislature's purpose in enacting the challenged statutes. *Compare Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 882 (Fla. 1983)

Upon review, the Revised Florida Products Exemption's history reveals the Florida legislature's protectionist purpose for the tax scheme and is, therefore, critically relevant to this Court's determination of the constitutionality of the challenged law. The Florida legislature, intending to protect certain Florida agricultural products, and to protect the manufacturers using those products, enacted the Revised Florida Products Exemption. From among the legion of agricultural products used for the making of wines and distilled spirits, the legislature decided to favor citrus, sugarcane, and certain species of grapes by granting these products a commercial advantage on the market. In its selectivity, the legislature knew that only Florida and a few other states produce the favored agricultural products in commercial quantities.

Thus, this Court's review of the Florida statutes' legislative history will reveal the legislature's transparent intent to use the Revised Florida Products Exemption to effect economic protectionism.[4] Two dominant themes emerge.

First, the Florida legislature intended the new statutory scheme to retain the protectionist character of the former Florida Products Exemption, which unconstitutionally discriminated in favor of Florida manufacturers and distributors and Florida products.

Representative Jones, a sponsor of the new legislation, explained the purpose of the Revised Florida Products Exemption to three Florida House of Representatives Committees. On April 23, 1985, before the House Committee on Regulated Industries and Licensing, Mr. Jones stated:

> The legislature has been very clear in its intent, and I hope that today we will continue to express our hope that Florida products will be used in the manufacture of these products, and that they will be sold here and throughout the country . . . . I want to make it very clear that, since I'm not an expert in this area, my entire purpose and intent is simply to retain what we have done for the last twenty years.

[4] McKesson asked the Circuit Court to take judicial notice of the legislative history. (A. 381-492.) This Court, of course, may also take judicial notice. Section 90.202 of the Florida Evidence Code does not limit judicial notice to trial courts. *See also* Fla. Evid. Code § 90.207 (1986) (Sponsors' note, citing cases).

(A. 387.) Before the House Committee on Appropriations, Mr. Jones stated: "What we're doing here is to retain those 300 jobs that have been developed in Florida as a result of our policies towards Florida products." (A. 423.) Representative Hargrett, a co-sponsor of the legislation, testified before the same Committee:

> Chairman, ladies and gentlemen of the Committee, I just wanted to say this bill is necessary in order to preserve the home state wine industry that we've begin [sic.] to create in this state. I have a winery in my district called St. August Wines of St. Augustine; they have one here in Tallahassee called Lafayette Winery. We are developing wineries all over the state and I encourage your support of this bill.

(A. 426-27.) During Mr. Jones' testimony before the Appropriations Committee, the Chairman commented that representatives from the grape industry had contacted him. Mr. Jones assured him that the legislation would in fact "take care of them." (A. 428.) Before the House Committee on Finance and Taxation, Mr. Jones stated:

> I am here to try to protect some jobs, roughly about 200 jobs in my district that are there because we granted this exemption back in the '60's. The industry, the distilleries that are there, have grown because of the intent of the legislature, and they have been successful in keeping those jobs going when we've lost them in other areas. . . .
>
> With the language that we have here, we are trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits.

(A. 415-18.)

Before the Florida Senate Commerce Committee on May 9, 1985, Senator Crawford, the Senate sponsor, reiterated the same theme:

> Frankly this bill is a jobs bill. It maintains the status quo of an existing tax exemption which has been a good tax exemption for the State of producing jobs and money for the State. . . .
>
> It allows a reduced rate for people who use citrus products and cane products from Florida. It is a bill that produces a lot of jobs and a lot of money for this State.

(A. 433.) Before the Florida Senate Finance and Taxation Committee on May 14, 1985, Senator Crawford stated that the bill "maintains the status quo on the current exemption that we have." (A. 499.)

On the House floor, during the May 18, 1985 debate of the Revised Florida Products Exemption bills, Mr. Jones noted that Florida had "granted a benefit to the distillers in Florida using Florida products for many years." (A. 461.) Mr. Jones explained that while the United States Supreme Court's decision in *Bacchus* had disturbed the status quo, the sponsors did not intend to abandon the tax exemption. "We're simply trying to protect what was in place prior to this Supreme Court decision." (A. 461-62.) During the House floor debates on May 28, 1985 and May 31, 1985, Mr. Jones referred to the legislation as "Florida Products bills." (A. 460-69.)

Second, the Florida legislators hoped to circumvent the Commerce Clause holding in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), by continuing to favor Florida commerce. During the the [sic] Senate Commerce Committee deliberations, the Chairman responded to another senator's concern that, while encouraging the use of Florida products, the tax exemptions might also encourage the use of out-of-state citrus, grapes, and sugarcane:

> [t]he reality is we have a way constitutionally of giving support to industry that would locate in this state, would give jobs to this state and would pay taxes in the state and the way we're doing it it would meet the criteria established by the Supreme Court and all the practical effects in reality is going to accomplish exactly what we want. We could argue theory but I think reality is much more important.

(A. 443-44.) Senator McPherson added --

> [w]hat Senator Crawford has tried to do is structure the law so that the word "Florida" is not in there and yet you are using primarily Florida products. I don't think anyone really argues with that.

(A. 444-45.) Immediately before the Senate Committee voted to adopt the bill, Senator McPherson concluded:

> [t]he way the bill is drafted, it is artfully drafted to take care of the constitutional requirements, but also it is worded in such, and I tried to make this clear, that every state that has a preferential treatment law, which most of these I've mentioned do, then they cannot take advantage of our law so that effectively stops anybody from doing it, so it only continues the status quo as we know it in Florida.

(A. 446.)

During the Florida Senate Finance and Taxation Committee meeting on May 14, 1985, Senator Grant objected that the sponsors of the Revised Florida Products Exemption intended to maintain the protection of the Florida alcoholic beverage industry but would not continue to protect the Florida gasohol industry, and argued for the protection of both industries:

> Senator, I thought that one bill addressed, that both bills in fact address the same point. I thought it was the production of

> jobs, the continuation of use of Florida products without saying so because that was a constitutional issue . . . I wonder why we want to continue one exemption and remove another.

(A. 450-51.) Senator Crawford, in response, explained that the sponsors had found disagreement among Florida producers regarding how the legislature should proceed with gasohol legislation, but no such disagreement among Florida producers regarding how the legislature should proceed with alcoholic beverage legislation. (A. 451.) Senator McPherson then added this candid observation:

> I think the difference is that by exercising your good bill here will help Florida people, Florida businesses and the exemption of the gasohol the way it was so written was allowing foreign people to take advantage of it. It's the philosophy as far as exemptions is probably the same, but it's who gains is what's important.

(A. 452.)

Thus, in essence, the legislature altered the former Florida Products Exemption but maintained the protectionist purpose and effect in the new law.[5]

2. The Florida Law Effectively Protects Florida Commerce from Interstate and Foreign Competition.

Florida's producers and other states' and countries' producers compete for sales to manufacturers of alcoholic beverages. With respect to wine and wine coolers, Florida's producers can grow the

[5] Appellants cannot refute this legislative history. Only Todhunter suggests that the legislative history offers a competing legislative purpose for the statutes, and Todhunter does not offer a statement from one of the legislative sponsors or even from one of the legislators. Rather, Todhunter relies on a quote from a lobbyist representing the Wine and Spirits Distributors of Florida. (Todhunter's Brief at 11.)

species that most consumers prefer, *Vinifera*, but can grow the Florida species. They compete with other states' and countries' producers, who can grow the *Vinifera* species. (A. 369-72.) With respect to liquor, Florida's producers of citrus and sugarcane compete with other states' and countries' producers, who frequently cannot grow citrus or sugarcane but can grow alternative crops. (A. 374-80.)

The Revised Florida Products Exemption favors Florida's producers in the competition in interstate and foreign markets and prevents other states' and countries' producers from competing on equal terms. With respect to wine and wine coolers, the Florida statute counters Florida's inability to produce the preferred *Vinifera* species and other states' and countries' ability to produce the preferred species by providing tax exemptions only for species which Florida can produce. (A. 369-72.) With respect to liquor, the Florida statute builds on Florida's historic preeminence in the production of citrus and sugarcane and many other states' and countries' inability to produce citrus and sugarcane by providing tax preferences only for citrus and sugarcane. (A. 374-80.)

In other words, Florida has decreed that its grape, citrus, and sugarcane products shall have a commercial advantage over certain other states' and countries' producers in the competition for sales to the manufacturers of alcoholic beverages. Thus, the manufacturers who use the Florida law's favored products obtain a commercial advantage from their lowered cost as a result of the tax breaks. (A. 374-80.) Such anticompetitive protectionism clashes with "the common market created by the Framers of the Constitution." *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, Inc.* 424 U.S. 366, 380, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976).

The Supreme Court has invoked the Commerce Clause to restrict the means by which a state may constitutionally seek to promote its own industry. The Court has repeatedly applied Justice Cardozo's formulation of the rule:

> Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing

> an economic barrier against competition with the products of another state or the labor of its residents.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527, 555 S.Ct. 497, 79 L.Ed. 1032 (1935).

In reviewing a state's restrictions on interstate commerce, the Supreme Court looks to the restrictions' practical effect. For example, in *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951), the Court found that a city regulation, which on its face purported to advance health and safety, had the practical effect of discriminating against interstate commerce, rendering the regulation unconstitutional. The Court in *Best & Co. v. Maxwell*, 311 U.S. 454 (1940), stated:

> The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

Id. at 455-56. *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (Court must focus on state tax provisions' "practical effect"); *Maryland v. Louisiana*, 451 U.S. 725, 756, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) (Court must assess state tax "in light of its actual effect"); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980) (the Court's "principal focus of inquiry must be the practical operation of the statute").

The Florida Supreme Court has recognized the United States Supreme Court's approach. For example, in *Delta Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 317 (Fla. 1984), the Florida Supreme Court held unconstitutional a statute that discriminated against interstate commerce by providing a commercial advantage to local commerce. The Court recognized that the statute's practical effect was the focus of inquiry. *Id.* at 320.

The Revised Florida Products Exemption, which establishes a preferential trade area for the designated products, offends the Commerce Clause through its practical effect. For example, the winemaker who uses a grape species that does not grow in Florida incurs higher taxes than a winemaker who uses Florida grapes. As another example, the vodka manufacturer who uses Maine potatoes incurs higher taxes than the vodka manufacturer who uses Florida citrus. As another example, the brandy distiller who utilizes Barbados beet sugar rather than a prime Florida agricultural product, sugarcane, does not qualify its product for an economic advantage. Thus, the Florida act disrupts the interstate movement of other states' and countries' products that do not receive the Florida tax break and that compete in the Florida market with Florida's products. (A. 374-80.)

The United States district court in *Mapco, Inc. v. Grunder*, 470 F. Supp. 401 (N.D. Ohio 1979), declared unconstitutional an Ohio statute imposing taxes on coal whose practical effect resembled the Florida law's effect. The Ohio legislature did not expressly restrict tax advantages to Ohio coal, but subjected high-sulfur coal to a lower tax rate than low-sulfur coal. The vast bulk of Ohio's coal production was of high-sulfur. The court found that the tax disadvantaged the interstate movement of low-sulfur coal and thereby constituted a *prima facie* violation of the Commerce Clause. The court noted: "[s]urely a competent purchasing agent of a steam-electricity generating utility would consider this . . . price differential when deciding whether to purchase Ohio high-sulfur coal or Kentucky low-sulfur coal." *Id.* at 408.

Moreover, the discriminatory Florida tax statutes divest the out-of-state growers of any competitive advantages and confer advantages to local growers. Florida, which cannot grow *Vitis Vinifera*, the grape species that consumers usually prefer, has decided to discriminate against *Vinifera* and subsidize the grape species it can produce. (A. 369-72.) Florida, whose predominant products face competition for markets from other states' products, has attempted to affect many other states' ability to compete. (A. 375-77.)

The Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed. 2d 383 (1977), found unconstitutional a North Carolina statute that had a similar practical effect. The North Carolina statute interfered with the prevailing free market forces by boosting the competitive advantage of local growers and dealers at the expense of out-of-state growers and dealers. *Id.* at 350-52. The statute offered the North Carolina apple industry "the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit." *Id.* at 352. The Florida tax scheme exhibits the same defect.

Under the Commerce Clause, Florida cannot pass a law decreeing that products from Florida and a few other states will be taxed at one rate and products from the remaining states will be taxed at a higher rate.[6] The Revised Florida Products Exemption has the same practical effect. As the court stated in *Mapco, Inc. v. Grunder*, where in practical operation a state's statute favors its own products, it "is no less invalid because it is not cast in terms of location. The commerce clause forbids both forthright and insidious discrimination." 470 F. Supp. at 410 n.14.

Appellants repeatedly invoke *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), for the proposition that a state may enact laws that have the purpose and effect of encouraging local commerce, but ignored that the Commerce Clause circumscribes the means by which a state constitutionally may seek to promote its own commerce. The Supreme Court in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 877 n.6, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985), summarized the *Bacchus* holding:

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[6] In *CTS Corp. v. Dynamics Corp. of America*, 55 U.S.L.W. 4478 (April 21, 1987) (Nos. 86-71, 86-97), the Supreme Court upheld an Indiana law concerning corporate takeover attempts. The Indiana law, which applies only to Indiana corporations, affects out-of-state offerors, seeking to acquire an Indiana corporation, and local offerors equally. The Revised Florida Products Exemption does not affect out-of-state producers and local producers equally, but rather discriminates against a majority of out-of-state producers in order to promote the producers of Florida's products.

> Thus, in *Bacchus*, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry" [468 U.S. 263, 271 (1984)], we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business [*id.* at 278].

Florida's overriding purpose for its alcoholic beverage tax scheme is to encourage the sale of Florida products at the expense of non-Florida products. The tax statues' purpose is illegitimate, *Bacchus Imports, Ltd. v Dias*, 468 U.S. 263 (1984), and subverts the Commerce Clause's creation of a unified national market. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). A state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443, 25 L.Ed. 743 (1880).

The State admits that the Florida legislature sought to increase the market share of Florida Products, while it sought to maintain Florida's excise tax base. (State's Brief at 2, 27-28.) Florida has accomplished its objectives by disproportionately imposing its alcoholic beverage excise tax burden on out-of-state commerce, while granting tax breaks to local commerce. In other words, Florida's tax scheme requires interstate commerce to fund Florida's protectionism.

Appellants argue that the Florida statutes do not offend the federal Constitution because the statutes do not discriminate against producers in some sates and countries that are able to produce the Florida products. In effect, appellants ignore that the constitutional issue is not whether the Florida statutes effectively discriminate against commerce from *every* other state and country, but whether it effectively discriminates against commerce from *any* other state or country.

When the United States Supreme Court, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), reviewed a North Carolina statute that discriminated against states that used more

more rigorous grading standards for apples that North Carolina used, the Supreme Court specifically noted that the statute did not discriminate against all states that exported apples to North Carolina but only against seven other states that had their own grading systems. The Supreme Court rejected North Carolina's argument that its statute did not distinguish states by name and ruled that the statute, which primarily imposed a barrier against Washington's apples, violated the Commerce Clause.

When the United States Supreme Court, in *Sporhase v. Nebraska ex. rel. Douglas*, 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982), reviewed a Nebraska statute that discriminated against states that did not grant reciprocal rights to transport ground water, the Supreme Court determined that the statute, which did not discriminate against all states, operated as a barrier to commerce between Nebraska and Colorado. The Supreme Court declared the Nebraska statute unconstitutional under the Commerce Clause. *See also Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

When this Court, in *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984), reviewed the finding that a Florida statute discriminated against other countries (but not other states) that produced alcohol for gasohol, this Court found that the fact that the statute did not discriminate against other states did not save the law from constitutional attack. This Court declared unconstitutional the Florida statute, which imposed a barrier against only foreign countries' products, under the Commerce Clause and the Import - Export Clause.

When the Supreme Judicial Court of Maine, in *Private Truck Council of America v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986), *cert. denied*, 106 S.Ct. 1997, 90 L.Ed.2d 677 (1986) reviewed a Maine statutes that discriminated against states that imposed certain taxes on Maine trucks, the Court specifically rejected Maine's argument that the statute's discriminating "against only some, not all, foreign-registered trucks" made the statute constitutional. The Court noted that "Balkanization, even through [sic] only partial is still

Balkanization" and declared the statute unconstitutional under the federal Commerce Clause. *Id.*

Thus, in considering McKesson's challenge, this Court cannot sustain the Florida statutes simply because the Florida legislature permitted a few other states, whose geography and climates allow them to produce the favored products, to petition Florida to participate in the discrimination against the disfavored products. Rather, this Court must declare the Florida statutes unconstitutional because the statutes discriminate against commerce from the majority of states whose geography and climate do not permit them to produce the favored agricultural products. As federal and state courts consistently have decided in similar cases, the Florida statutes' not discriminating against every other state and country simply does not redeem the statutes' unconstitutional discrimination against some states and countries.

The Florida law's Take Back Provisions further the discrimination against interstate commerce. The provisions prevent out-of-state manufacturers and distributors who do in fact use the favored products from receiving the tax breaks. The law grants the Florida Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, the discretion to determine whether the state, territory, or country in which the alcoholic beverage is manufactured or bottled: (1) "discriminates" against alcoholic beverages manufactured or bottled outside of its boundaries; (2) provides "economic incentives or advantages" exclusively for alcoholic beverages produced within its boundaries; or (3) provides "export subsidies" for agricultural products used in making the alcoholic beverages. Upon an affirmative finding by the Florida agency with respect to any of the above conditions, Florida withholds the tax breaks.[7]

The Florida legislature may have been too clever in designing the Take Back Provisions to prevent out-of-state producers from

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[7] The Supreme Court has stated that "[t]he protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080, 2086 n.5 (1986).

competing on even terms in Florida. Predictably, Florida has not turned the Florida statutes against local interests by ruling that the law, itself, constitutes Florida discrimination and, therefore, that Florida firms do not qualify for the tax exemption. But, certainly, New York might construe the Florida law as discriminatory, warranting reciprocal discrimination against Florida firms. Expanding the scenario, each state might allow its agencies to scrutinize other states' laws and, upon a finding of discrimination, authorize discrimination in turn against the offending state. The Commerce Clause was designed to prevent this very kind of commercial warfare. *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949).

Florida cannot save its discriminatory law with the assertion that the law actually promotes free interstate commerce. Florida stands the Commerce Clause on its head by assuming that it authorizes a state to erect trade barriers in response to trade barriers.

In *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976), in which a Louisiana milk producer challenged a Mississippi regulation requiring certain trade reciprocity, the Supreme Court rejected Mississippi's argument that its reciprocity requirement encouraged free trade among states by forcing a state that had been protecting its own producers to eliminate trade barriers. Where a state unconstitutionally burdens interstate commerce by protecting its own producers from competition, "the Commerce Clause itself creates the necessary reciprocity: Mississippi and its producers may pursue their constitutional remedy by suit in state or federal court challenging Louisiana's actions as violative of the Commerce Clause." *Id.* at 380.

Similarly in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), a challenge to Nebraska's reciprocity requirement for the interstate transportation of ground water, the Court held that the reciprocity provision erected an impermissible barrier to interstate commerce and could not survive the "strictest scrutiny" reserved for discriminatory legislation. *Id.* at 957-58. "The reciprocity requirement cannot, of course, be justified as a response to another State's unreasonable burden on commerce." *Id.* at 958 n.18. Thus, in the words of the Supreme Judicial Court of Maine, a "state may not violate

the Commerce Clause in an attempt through self-help to coerce another state into desisting from a Commerce Clause violation." *Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986).

Interestingly, Florida rejected Canandaigua Wine Company's application for the tax exemption after determining that New York, Canandaigua's home state, discriminated in favor of New York wine products. *In re Canandaigua Wine Co. Inc.*, January 8, 1986, Final Order, (Fla. Div. of Alcoholic Beverages and Tobacco 1986). The particular New York legislation faced a challenge in court on constitutional grounds. In *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850 (S.D.N.Y. 1985), *aff'd and modified*, 761 F.2d 140 (2d Cir. 1985), the court applied the Commerce Clause to find that the New York Alcoholic Beverage Control Law intended to aid the New York grape industry and constituted unconstitutional economic protectionism. *Loretto Winery* underscores that the Commerce Clause, in lieu of a retaliatory free-for-all among the states, provides the constitutional means for challenging protectionist state legislation.

Further, despite appellants' comments about the Florida Take Back Provisions' equalizing competition, the Take Back Provisions do not even attempt to achieve proportionality. Under the Florida provisions, the state agency makes no attempt to calibrate any manufacturer's perceived advantage before denying the substantial commercial advantage conferred by the Florida law. The most trivial "economic incentive" provided by an out-of-state firm's home sate might preclude the firm's receipt of the Florida tax break, whether the particular firm ever benefited from the incentive or not.

The Revised Florida Products Exemption discriminates against interstate commerce. Florida has sought a shortsighted parochial advantage at the expense of the national common market. The law's protectionist purpose coincides with its practical effect. Both the purpose and the effect make the statutes unconstitutional.

B. The Revised Florida Products Exemption Imposes an Unconstitutional Burden on Interstate Commerce.

If the Revised Florida Products Exemption did not have a protectionist purpose and effect and, thus, were not *per se* unconstitutional, Florida's alcoholic beverage tax scheme still would violate the Commerce Clause because it places an excessive burden on interstate commerce. The Commerce Clause requires this Court not only to determine whether the law is protectionist in purpose or effect, but also to inquire:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). *See also Pike v. Bruce Church*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The Revised Florida Products Exemption fails to satisfy even one of these requirements for constitutionality.

1. The Florida Tax Neither Regulates Even-Handedly nor Creates only Incidental Effects on Interstate Commerce.

As discussed above, Florida's taxing scheme is not evenhanded. Florida grants a tax exemption or preference to certain agricultural products and selects the products for no reason other than the fact of their cultivation in Florida. In this way, the burden of the Florida tax -- far from being evenhanded -- falls on those distributors who, lacking tax advantages, must sell higher-priced, non-Florida goods and suffer a corresponding loss of sales. (A. 374-80.)

The Florida tax's effects on interstate commerce are not "incidental." Florida's tax law does not directly affect only local

goods and, thus, only incidentally affect interstate commerce when those goods are sold. Rather, Florida's purposefully limited tax scheme seeks to favor Florida products and to disfavor foreign products in interstate commerce. (A. 378-80.) The direct result of Florida's alcoholic beverage tax scheme is the prohibited effect on interstate commerce. (A. 378-80.)

Appellants' citing to *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), does not support their claim of "incidental" effects. In *Exxon*, the Supreme Court upheld a Maryland statute concerning gasoline dealer against a Commerce Clause challenge. The Court expressly distinguished the Maryland statute, which did not impose any additional costs upon the out-of-state dealers, from the discriminatory state statutes that impose additional costs. *Id.* at 126. The Revised Florida Products Exemption, of course, erects a competitive barrier against out-of-state producers by imposing additional taxes upon every producer who does not produce Florida's products.

Moreover, the Court in *Exxon* distinguished the Maryland statute, which did not discriminate against interstate commerce, from state statutes that effectively "cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market. . . . " *Id.* at 126 n.16. In this case, the State admits that the Revised Florida Products Exemption effectively causes Florida products to gain market share by displacing out-of-state-products. (State's Brief at 27-28.)

2. The Florida Tax Does Not Serve a Legitimate Local Purpose.

As discussed above, Florida's overriding purpose for its alcoholic beverage tax scheme is to encourage the sale of Florida products at the expense of non-Florida products. This purpose is illegitimate, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and subverts the Commerce Clause's creation of a inified national market. *See Dean Milk Co., v. Madison*, 340 U.S. 349, 356 (1951). A state may not "build up its domestic commerce by means of unequal and oppressive

burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

Florida's desire to nurture local industry represents an attempt to further a purely economic purpose that -- whether the implementation is non-discriminatory or not -- is constitutionally suspect under the Commerce Clause. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 530-39 (1949). *Accord* L. Tribe, *American Constitutional Law* § 6-12, at 340-42 (1978) (contrasting health and safety laws with local economy laws). As the Supreme Court noted in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 43-44 (1980):

> In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.

Appellants' citing *Archer Daniels Midland Co. v. State of Colorado*, 690 P.2d 177 (Colo. 1984), does not support their claim that the Florida statutes have a legitimate purpose. In *Archer Daniels Midland*, in upholding a Colorado statute against a Commerce Clause challenge, the Colorado Supreme Court found that the Colorado legislature "intended to provide an incentive to entrepreneurs to enter the fuel-grade alcohol market without subsidizing larger, more established producers," rather than intending to protect Colorado industry. *Id.* at 184. The Court emphasized that the challenged statute's effect did not depend on where a producer was located but rather on the size of the producer's operation. *Id.* at 185-86.

In contrast, the Florida legislature intended the Revised Florida Products Exemption to "enhanc[e] the flagging receptivity of consumers to alcoholic beverage products made from crops which Florida is adapted to growing," thereby protecting Florida industry. (State's Brief at 27.) The Florida statutes' effect depends on the producer's geography. Agricultural producers cannot change the climatic conditions of their respective states and countries in order to

qualify for Florida's favoritism for its local products. The Commerce Clause will not allow any state to hinder competition "with the products of another state or the labor of its residents." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

Moreover, the Florida tax cannot survive Commerce Clause scrutiny by attempting to compensate Florida products for any disadvantages other states may inflict. Even if Florida's compensating disadvantaged products were a legitimate state goal, the Florida tax irrationally relates its advantages for specific products under specific circumstances to the disadvantages the specific products suffer under other states' statutes. Florida's identification of any home state advantage (no matter how small) results in the loss of all Florida benefits (no matter how large). For example, if a New York manufacturer received a New York state subsidy of ten cents a gallon on wine exports to Florida, the manufacturer would lose his entire Florida exemption of as much as $3.50 per gallon. The tax scheme's failure to calibrate its impact is a fatal constitutional defect. *See Sporhase v. Nebraska*, 458 U.S. 941, 958 (1982) (State must narrowly tailor any reciprocity requirement to the state's legitimate purposes).

3. The Florida Tax Imposes Excessive Burdens on Interstate Commerce.

Florida's tax scheme necessarily achieves its purposes by placing a disproportionate burden on interstate commerce. Therefore, Florida has the burden of demonstrating that the local benefits from its tax outweigh the burden on interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 (1977). Florida must justify its discriminating tax "both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake." *Hughes v. Oklahoma*, 441 U.S. at 336. *See also Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982). Florida cannot possibly carry this burden of proof.

Florida could have nurtured its local industry using means less discriminatory than a disproportionate tax on non-Florida alcohol. Indeed, several such alternatives have received express judicial approval under the Commerce Clause.

Among the many less discriminatory alternatives, Florida could have provided property tax relief to Florida's manufacturers or growers. The courts have approved this method of encouraging local industry. *See, e.g., Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 864 (S.D.N.Y. 1985) This type of non-discriminatory tax reform, which relieves local competitors of a tax, does not isolate non-Florida competitors for unique tax burdens and thus does not violate the "cardinal rule of Commerce Clause jurisprudence" that a state may not " 'impose a tax which discriminates against interstate commerce. . . by providing a direct commercial advantage to local business.' " *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984) (quoting *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977)).

As another less discriminatory alternative, Florida could have stimulated its agricultural industry with direct cash subsidies, state-sponsored research, or state-sponsored promotional campaigns for Florida products. *See generally Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. at 864 (discussing several alternatives).

In other words, Florida can effectively promote its industry without violating the Commerce Clause precept that it not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 337.

III. THE REVISED FLORIDA PRODUCTS EXEMPTION INTRUDES IMPERMISSIBLY INTO THE EXCLUSIVELY FEDERAL AREA OF FOREIGN AFFAIRS.

The Revised Florida Products Exemption is unconstitutional under the federal Constitution for another, independent reason[8] The Florida statutes violate a fundamental premise of federal-state relations. By authorizing its courts to inquire into foreign governments' policies and by attempting to change those policies that Florida finds distasteful, Florida has intruded impermissibly into the exclusively federal area of foreign affairs. Accordingly, Florida's statutes are unconstitutional. *See Zschernig v. Miller*, 389 U.S. 429, 430-41, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1376-80 (D.N.M. 1980); *Bethlehem Steel Corp. v. Board of Commissioners*, 80 Cal Rptr. 800 (Ct. App. 1969); L. Tribe, *American Constitutional Law* § 4-5, at 172 (1978); 2 C. Antieau, *Modern Constitutional Law* § 10:19, at 37-38 (1969). *Cf. Hines v. Davidowitz*, 312 U.S. 52, 62-64 (1941).

The framers of the federal Constitution feared that individual states might impair foreign relations by unilateral action in the international sphere. "The peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members." *The Federalist* No. 80, at 535-36 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original). In accordance with the clear intentions of the framers, the Supreme Court has declared without ambiguity that the individual state "does not exist" in the realm of foreign affairs. *United States v. Belmont*, 301 U.S. 324, 331, 57 S.Ct. 758, 81 L.Ed.1134 (1937).

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[8] Although the Circuit Court in its Order did not have to reach McKesson's arguments concerning the constitutionality of the Revised Florida Products Exemption in light of the federal government's power over foreign affairs, this Court may base its finding of unconstitutionality upon any reasonable basis for the finding in the record. *In Re Estate of Yohn*, 238 So. 2d 290, 295 (Fla. 1970); *State Plant Board v. Smith*, 110 So. 2d 401, 405 (Fla. 1959).

The Supreme Court applied these principles in *Zschernig v. Miller*, 389 U.S. 429 (1968), to invalidate an Oregon statute that conditioned the right of aliens to inherit Oregon property on the existence of reciprocal rights for United States citizens in foreign countries. The Oregon statute required state courts to inquire into the laws and policies of foreign governments and induced foreign nations to frame their inheritance laws so that Oregonians would have reciprocal inheritance rights. *Id.* at 433-41. The Supreme Court found that the Oregon statute "ha[d] a direct impact on foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. Accordingly, the statute was unconstitutional as a form of "state involvement in foreign affairs and international relations -- matters which the Constitution entrusts solely to the Federal Government." *Id.* at 436.

Florida's intrusion into foreign affairs is even deeper than Oregon's. Unlike the reciprocal inheritance statute in *Zschernig*, Florida's statutes directly conflict with specific, definitive articulations of United States policy in the sensitive areas of international trade. Congress, to whom the Constitution exclusively entrusts the regulation of "Commerce with foreign Nations," has enacted laws that pervasively regulate the imposition of customs duties on foreign imports. Federal law preempts stat tax laws that intrude into this exclusively federal field. U.S. Const., art. I, § 8, cl. 3 (Commerce Clause). *See Xerox Corp. v. County of Harris*, 459 U.S. 145, 159, 103 S.Ct. 523, 74 L.Ed.2d 323 (1982); *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840 (1941).

Florida's Take Back Provisions deny tax preferences and exemptions to the products of countries that provide certain economic advantages to their own producers. §§ 564.09 and 565.12, Fla. Stat. (1985). The State has candidly described the Take Back Provisions as an effort to "foster a 'level playing field'" in the alcoholic beverages trade. (A. 566.) Florida's statutes are designed to level the playing field in two ways: (1) by attacking 'the granting of a compounded benefit to producers in jurisdictions which already allow an exclusive, parochial incentive for such products"; and (2) by "discourag[ing] the implementation or continuance of purely local favoritism in other

jurisdictions." (A. 565.) Thus, Florida's retaliation against countries that favor their own products attempts to change the trade policies of the countries.

With these goals, Florida's statutes cannot pass muster under the Supremacy Clause. Federal legislation preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1940). Florida's Take Back Provisions are an obstacle to the Congressional purposes expressed in specific laws that direct the United States' commerce with foreign nations. These laws include the Trade Act of 1974, as amended (19 U.S.C.A. §§ 2411 through 2415 (West Supp. 1986)); The Tariff Act of 1930, as amended (19 U.S.C.A. §§ 1301 through 1677h (West Supp. 1986)); The Caribbean Basin Economic Recovery Act (19 U.S.C. §§ 2701 through 2706 (West Supp. 1986)); and the Wine Equity and Export Expansion Act of 1984 (19 U.S.C.A. §§ 2801 through 2806 (West Supp. 1986)). Florida's statutes also violate the United States' international obligations under the General Agreement on Tariffs and Trade (GATT), 61 Stat. (pts. 5 & 6) (1947). Each of these federal laws preempts Florida's.

A. The Trade Act of 1974.

Congress, in the Trade Act of 1974, gave the President broad authority to negotiate trade agreements and to respond to actions by foreign countries that disadvantage United States commerce. Congress saw the need "to prevent a serious deterioration in the spirit of economic cooperation that is essential for the preservation of economic and political stability in a rapidly changing world." S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7188). Florida, by taking unilateral action to level the international playing field, has unconstitutionally intruded into this exclusive federal area.

Section 301(a) of the Trade Act, as amended, authorizes the President to take "all appropriate and feasible action within his power" to "respond to any act, policy, or practice of a foreign country" that is

"unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce." 19 U.S.C.A. § 2411(a)(1)(B)(ii) (West Supp. 1986). Congress considered the President's retaliatory authority "a vital aspect of the trade negotiations" that the Trade Act authorized. S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7208-09). In the exercise of his broad statutory power, the President may selectively impose discriminatory tariffs and other restrictions against particular products and particular foreign countries. 19 U.S. C.A. § 2411(a)(2)(A) & (B) (West Supp. 1986). For example, the President recently authorized quantitative restrictions on certain European wine imports in response to European Economic Community restrictions on various United States products. 51 Federal Register 18,296 (May 16, 1986).

Congress purposefully has given the President central authority to direct the United States' response to burdens on its foreign commerce. The President must select the United States' retaliatory actions in light of international economics and politics. As Congress noted, "[t]rade policies cannot be divorced from other important contributions to, or influences on, the U.S. and world economies." S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 7186, 7189). Florida's unsanctioned interference in this process can only hinder the federal government's efforts to achieve beneficial trade relations for the whole United States.

B. The Tariff Act of 1930.

Section 303 of the Tariff Act of 1930, as amended, protects United States commerce from foreign subsidization of exports. Under the Tariff Act, whenever the Secretary of the Treasury determines that a foreign export has received a subsidy, the Secretary must levy a countervailing duty in the amount of the subsidy. 19 U.S.C.A. § 1303(a)(1) (West 1980).

Similarly, Florida's Take Back Provisions impose discriminatory taxes on alcoholic beverages from countries "which provide export subsidies for agricultural products used in making said alcoholic

beverages" or "other economic incentives or advantages." §§ 564.06(9)(b) & (c), 565.12(1)(c)(2) & (3), and 565.12(2)(c)(2) & (3), Fla. Stat. (1985). By thus intruding into the area of foreign export subsidies, Florida's statutes frustrate the goals of the federal countervailing duty statute.

The federal Act was carefully drafted to "offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies." *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 456, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978). The Secretary of the Treasury is empowered to establish regulations to "accurately carry out this purpose." *Id. See also* 19 U.S.C.A. §§ 1303(b) and 1677 (West 1980). In light of the federal policy of measured response, Florida cannot impose its own additional tax. Florida's discriminatory tax frustrates Congress' intention to offset accurately foreign trade advantages.

C. The Caribbean Basis Economic Recovery Act (CBERA).

Congress enacted the Caribbean Basin Economic Recovery Act (CBERA) in 1983. The purpose of CBERA is to address "deep-rooted structural problems" in the Caribbean Basin which have "caused serious inflation, high unemployment, declining gross domestic product growth, enormous balance-of-payments deficits, and a pressing liquidity crisis." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 644). The legislative history demonstrates Congress' concern that "this economic crisis threatens political and social stability throughout the region and creates conditions which Cuba and others seek to exploit through terrorism and subversion." *Id.*

Through CBERA, Congress has addressed Caribbean Basin problems by authorizing the President to offer trade benefits to Caribbean nations that satisfy certain political, economic, and social criteria. 19 U.S.C.A. § 2702 (West Supp 1986). "The centerpiece of the U.S. program is the offer of *one-way* free trade." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (reprinted in 1983 U.S. Code Cong. & Admin. News at 643, 644) (emphasis added). *See also*

the Congress Transmitting the Proposed Caribbean Basin Economic Recovery Act, 18 Weekly Comp. Pres. Doc. 323 (Mar. 17, 1982). CBERA authorizes a *complete* exemption from United States customs duties for most products, including sugarcane rum, from qualified Caribbean nations. Congress intended to increase sales of Caribbean rum by reducing the price to U.S. consumers. CBERA eliminates the usual $10.50 per proof gallon excise tax on imported distilled spirits. H. Rep. No. 98-26, 98th Cong., 1st sess., at 26 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 667).

Florida, a major producer of sugarcane, competes in the market for alcoholic beverages with several Caribbean nations. (A. 367-68.) The Revised Florida Products Exemption affects, for example, the rum market by granting preferential tax rates to alcoholic beverages made from Florida sugarcane. Florida's potential denial of these preferences to Caribbean rum would frustrate the federal policies expressed in CBERA. At the same time the United States seeks to *decrease* the price of Caribbean rum through an exemption from customs duties, Florida threatens to *increase* the price through its Take Back Provisions. The federal purposes expressed in CBERA will fail if Florida is free to impose a tax that offsets the competitive advantages that Congress has conferred. *Cf. Xerox Corp. v. County of Harris*, 459 U.S. 145, 152 (1982).

Further, Florida's administration of the Take Back Provisions directly involves Florida courts in impermissible foreign policy judgments. The factors that the Florida legislature has directed its courts to consider in applying the Take Back Provisions overlap with the factors that the President considers in determining whether to grant a particular Caribbean nation beneficiary status under CBERA. For example, a Florida court applying the Take Back Provisions considers whether a foreign country "impose[s] discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries," "provide[s] agricultural price supports or other economic incentives or advantages," or "provide[s] export subsidies." §§ 564.06 and 565.12, Fla. Stat. (1985). Under CBERA, the President considers:

> (3) the extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country; [and]
>
> . . .
>
> (5) the degree to which such country uses export subsidies or imposes export performance requirements or local content requirements which distort international trade . . . .

19 U.S.C.A. §§ 2702(c)(3), 2702(c)(5) (West Supp. 1986). In essence, Florida law directs Florida courts to make unauthorized foreign policy judgments that may subvert the President's and Congress' legitimate foreign policy judgments.

D. The Wine Equity and Export Expansion Act of 1984.

The Wine Equity and Export Expansion Act of 1984 is Congress' effort to remedy "a substantial imbalance in international wine trade." 19 U.S.C.A. § 2801(a)(1) (West Supp. 1986). Like Florida, Congress was concerned that "the United States wine industry faces restrictive tariff and nontariff barriers in virtually every existing or potential foreign market." *Id.* The Act requires the President to "direct the [United States] Trade Representative to enter into consultations with each major wine trading country to seek a reduction or elimination of that country's tariff barriers and nontariff barriers to (or other distortions of) trade in United States wine." 19 U.S.C.A. § 2804(a) (West Supp. 1986). The Act also authorizes the President to take action under the Trade Act of 1974 to respond to foreign trade barriers. 19 U.S.C.A. § 2804(c) (West Supp. 1986).

Florida's Take Back Provisions directly intrude into the federal government's diplomatic and regulatory activities in this area. Florida imposes its own discriminatory tax on "alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries." §§ 564.06(9)(a), 565.12(1)(c)(1), and 565.12(2)(c)(1), Fla. Stat.

(1985). Florida's sharing some of the federal government's goals in this area does not provide a legitimate occasion for Florida to make foreign policy. "Only the federal government can fix the rules of fair competition when such competition is on an international basis." *Bethlehem Steel Corp. v. Board of Commissioners*, 80 Cal. Rptr. 800, 803 (Ct. App. 1969). "[T]he existence of [a] federal Act cannot serve as a justification for state legislation since . . . it is the sole province of the federal government to act in this sphere." *Id.* at 804 n.8.

E. The General Agreement on Tariffs and Trade (GATT).

In the General Agreement on Tariffs and Trade (GATT), 61 Stat. (pts. 5 & 6), the United States and its major trading partners have pledged to refrain from specific discriminatory trade practices. The Take Back Provisions of the Revised Florida Products Exemption directly conflict with the United States' obligations under GATT.

GATT prohibits discriminatory taxes such as Florida's with the following provision:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be exempt from internal taxes and other internal charges of any kind in excess of those applied directly or indirectly to like products of national origin.

GATT, pt. II. art. III, § 1, 61 Stat. (part 5) A18 (1947) (first sentence). By definition, any application of Florida's Take Back Provisions to the products of a foreign country would violate GATT. Whenever a Florida court applies a Take Back to a foreign product -- thus withholding the tax exemption or preference afforded to Florida products -- that product is burdened burdened with "internal taxes . . . in excess of those applied directly or indirectly to like products of national origin."

GATT, as an international agreement, supersedes Florida law by virtue of the Supremacy Clause. U.S. Const., art. VI, cl. 2. *See*

generally United States v. Belmont, 301 U.S. 324, 331-32 (1937). Indeed, one court has held unconstitutional a state statute that contravened GATT by placing restrictions on the sale of foreign imports. *Territory v. Ho*, 41 Haw. 565, 567-71 (1957). However, regardless whether GATT directly preempts inconsistent state legislation, GATT is also an authoritative articulation of United States foreign policy with which Florida may not interfere. Thus, Florida's interference with foreign policy is invalid under *Zschernig v. Miller*, 389 U.S. 429 (1968).

Florida's attempt at the regulation of foreign trade is, in a word, unconstitutional.

IV. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S IMPORT-EXPORT CLAUSE.

The Import-Export Clause's purpose is to insure that, in regulating commercial relations with foreign governments, the United States is able to "speak with one voice." *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276, 285, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976). Thus, the clause prohibits any discriminatory tax by a state on imported goods and not merely direct taxes on importation. Id. at 288 n.7. *See also Cook v. Pennsylvania* 97 U.S. 566, 24 L.Ed. 1015 (1878).

The Revised Florida Products Exemption, by authorizing the denial of tax exemptions to foreign alcohol, effectively imposes a duty upon imports. As a result, Florida's statutes violate the Import-Export Clause of the United States Constitution. U.S. Const., art. I. § 10, cl. 2; *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976); *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374, 1376 (Fla. 1984).

As discussed above, Florida's Take Back provisions expressly authorize discrimination based on national origin. The Take Back Provisions empower Florida courts and officials to examine and judge the agricultural and trade policies of foreign governments. This

examination presupposes calculated discrimination. In effect, Florida's statutes require Florida to impose different taxes on the products of different countries solely on the basis of the place of origin.

The Import-Export Clause, as the Supreme Court interprets it, leaves no room for the Revised Florida Products Exemption. In *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976), the Court made clear that a state tax may not constitutionally "fall on imports as such because of their place of origin." *Id.* at 286. Although the Import-Export Clause does not accord imported goods preferential treatment, it "clearly prohibits state taxation based on the foreign origin of the imported goods." *Id.* at 287. The Court in *Michelin Tire Corp.* approved a nondiscriminatory state property tax because, unlike Florida's statutes, "it [could not] be used to create special protective tariffs or particular preferences for certain domestic goods, and it [could not] be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation." *Id.* at 286.

For over a century, the Supreme Court has not hesitated to invalidate discriminatory state taxes on imports. In *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964), for example, the Court held unconstitutional a ten-cent-a-gallon tax imposed by Kentucky on all persons bringing distilled spirits into the state. Kentucky's law, like Florida's, discriminatorily taxed liquor from other states and countries. When challenged under the Import-Export Clause by an importer of Scottish whiskey, the Kentucky law succumbed. *See also Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448, 6 L.Ed. 678 (1827) (invalidating discriminatory tax on imports); *Cook v. Pennsylvania*, 97 U.S. 566, 569 (1878) (invalidating taxes at retail level that favored certain specified domestic goods).

In addition, this Court's own analysis of the Import-Export Clause agrees with the United States Supreme Court's. In the recent case of *Miller v. Publicker Industries, Inc.*, 457 So. 2d 1374 (Fla. 1984), this Court held unconstitutional a Florida tax that exempted motor fuels

containing a stated percentage of alcohol. The exemption applied, however, only to alcohol distilled from United States agricultural products. This Court held the tax exemption unconstitutional because it "constitute[d] discriminatory taxation based upon the foreign origin of a product in violation of the import-export clause." *Id.* at 1376.

This Court's analysis in *Publicker* applies here. The tax in *Publicker* expressly favored goods of "U.S. origin." The Revised Florida Products Exemption's discrimination is less obvious in its effect on foreign goods because the legislature drafted the statute using generic descriptions of Florida products. Nevertheless, in this case, as in *Publicker*, the Florida legislature has authorized discrimination based on national origin. As in *Publicker*, Florida can discourage the consumption of foreign products by applying the Revised Florida Products Exemption's Take Back Provisions.

Florida's tax scheme is unconstitutional under the Import-Export Clause.

V. THE CIRCUIT COURT PROPERLY ENTERTAINED McKESSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

The Circuit Court recognized that McKesson's motion for partial summary judgment and the State's opposition to the motion did not raise a controversy concerning any genuine issue of material fact. McKesson and the State did not disagree on the authenticity of McKesson's submission of the legislative history. (The parties only disagreed on the legal significance of the Florida legislators' statements.) McKesson and the State did not disagree that the Florida statutes effect what appellants describe in their briefs as a "restructuring" of the Florida alcoholic beverage market by "encouraging" the sales of local products. (The parties only disagreed on the legal significance of indisputable agricultural economics.)

Accordingly, the Circuit Court determined that summary judgment was appropriate. No controversy concerning a genuine issue of material fact existed, Fla. R. Civ. P. 1.510(c), and any disputes as to

matters of law did not prevent entry of summary judgment. *Armstrong v. Southern Bell Telephone & Telegraph Co.*, 366 So. 2d 88, 90 (Fla. 1st DCA 1979). As the United States Supreme Court recently decided in *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986), under an identical standard --

> [T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

After McKesson filed its motion, the State did not suggest to the Circuit Court, through the filing of an affidavit or otherwise, that the Court should delay its consideration of the constitutionality of the Florida statutes. Florida law, of course, provides that a party may request a continuance of a hearing on a motion for summary judgment only by the filing of an affidavit, showing that the party cannot present facts essential to justify his opposition. Fla. R. Civ., P. 1.510(f). Continuance of a summary judgment hearing to permit additional discovery to prepare an opposition is at the discretion of the trial court. *Rosen v. Parkway General Hospital, Inc.*, 265 So. 2d 93, 95 (Fla. 3d DCA 1972).

On appeal, the State now suggests that the Circuit Court did not allow the State to complete its discovery concerning McKesson's standing. The State apparently wanted to discover facts that would establish that McKesson is not a producer of agricultural products or manufacturer of alcoholic beverages. Any discovery, however, about McKesson's production of the favored agricultural products or qualification of alcoholic beverages for preferential treatment was irrelevant to McKesson's challenge to the Florida statutes. McKesson indisputably established the factual basis for standing by demonstrating that it has been a distributor of alcoholic beverages and has paid the challenged taxes.

The Circuit Court did not abuse its discretion in entertaining McKesson's motion for partial summary judgment.

VI. McKESSON IS ENTITLED TO A REFUND OF THE TAXES IT HAS PAID WHICH FLORIDA HAS COLLECTED UNDER THE UNCONSTITUTIONAL STATUTES.

As a matter of federal Constitutional law, as well as Florida law, McKesson is entitled not only to a declaration that the Revised Florida Products Exemption is unconstitutional but also to the constitutional remedy for Florida's discrimination. In its prayer for relief in this action, McKesson has asked for an order directing the Florida Comptroller to grant a refund to McKesson of taxes Florida has collected from mcKesson under the unconstitutional statutes. Pursuant to section 215.26, Florida Statutes (1985), McKesson, which has paid these taxes under protest, is entitled to an appropriate refund of discriminatory taxes. For each of the Florida statutes' classifications for wine and liquor, McKesson must receive the difference between what it has paid and what a distributor who sold favored products paid.

A. Under Both Federal Constitutional Law and State Law, McKesson Is Entitled to a Tax Refund.

Under federal constitutional law, the taxpayer's remedy for an unconstitutional state tax statute is an action to recover the taxes. In *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280, 285, 32 S.Ct. 216, 56 L.Ed. 436 (1912) (finding a tax an unconstitutional burden upon interstate commerce), Justice Holmes stated:

> It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

The United States Supreme Court has not permitted a state to collect or retain taxes assessed under an unconstitutional statute. *See, e.g.*,

Dept. of Revenue v. *James Beam Co.*, 377 U.S. 341 (1964) (affirming Kentucky Court of Appeals judgment granting refund of alcoholic beverage taxes collected under a state statute that violated the Import-Export Clause); *Memphis Steam Laundry Cleaner* v. *Stone*, 342 U.S. 389, 72 S.Ct. 424, 96 L.Ed. 436 (1952) (reversing, without remand, state court's reversal of trial court's granting a refund of tax violating Commerce Clause); *Best & Co.* v. *Maxwell*, 311 U.S. 454 (1940); *Iowa-Des Moines Bank* v. *Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931) (holding that a taxpayer may recover the excess taxes paid); *I. M. Darnell & Sons Co.* v. *City of Memphis*, 208 U.S. 113, 120, 28 S.Ct. 247, 542 L.Ed. 413 (1908) (finding tax that violated Commerce Clause a "nullity"); *Tierman* v. *Rinker*, 102 U.S. 123, 127, 26 L.Ed. 103 (1880) (ruling statute "inoperative" so far as it discriminates).

Thus, federal courts in this century have required states to refund unconstitutional taxes to taxpayers. In *Carpenter* v. *Shaw*, 280 U.S. 363, 369, 50 S.Ct. 121, 74 L.Ed. 478 (1930), the Court determined that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Accord Gallagher* v. *Evans*, 536, F.2d 899, 900-01 (10th Cir. 1976). In *United States* v. *State Tax Commission*, 645 F.2d 4 (5th Cir. 1981), *cert. denied*, 454 U.S. 896, 102 S.Ct. 394 (1981), a state refused to refund an unconstitutional tax imposed on instrumentalities of the federal government on the ground that the federal government had failed to comply with a state statute. The Court rejected the state's argument:

> The retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of the tax in the first instance.

645 F.2d at 5.

The Supreme Court and other federal courts appreciate that when a tax is unconstitutional, only the remedy of a refund will cure the constitutional injury. A taxpayer suffers the constitutional injury when it pays a discriminatory tax that provides "a direct commercial

advantage to local business." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 (1984). The taxpayer, therefore, has a federal right to a remedy -- a right to a refund of the difference between the disfavored products' rate and the favored products' rate. Permitting the State to avoid that remedy through a declaration of prospective relief would provide an incentive to continue to enact and collect illegal taxes. The State would enjoy the benefit of its unconstitutional acts without remedying its violation of the federal Constitution. Indeed, by rearranging the language of its statutes, the State could repeatedly attempt to continue to collect unconstitutional taxes. The federal constitutional system could not tolerate this situation.

Of course, under Florida law, as under federal constitutional law, the taxpayer's remedy for an unconstitutional tax scheme is an action to recover the taxes paid. *See, e.g., Osterndorf* v. *Turner*, 426 So. 2d 539, 545 (Fla. 1982); *City of Miami* v. *Florida Retail Federation, Inc.*, 423 So. 2d 991, 993 (Fla. 3d DCA 1982); *Coe* v. *Broward County*, 358 So. 2d 214, 216 (Fla. 4th DCA 1978). This Court, echoing Justice Holmes' statement in *Atchison*, has stated: "In this country where the citizen has paid good money illegally and has an election of remedies for recovery, he should be permitted to employ the most complete and expeditious remedy possible to recover. . . ." *State of Florida ex rel. Palmer-Florida Corp.* v. *Green*, 88 So. 2d 493, 495 (Fla. 1956) (ordering recovery of documentary tax).

The Supreme Court in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), after holding that the Hawaii statute unconstitutionally discriminated against interstate commerce, did not resolve the question of a refund. The alcoholic beverage distributors challenging the statute had sought a total refund of approximately $45 million. *Id.* at 266. The Court directed the Hawaii court to address the refund issues, reasoning that application of state law might obviate consideration of federal constitutional law. "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." *Id.* at 277 n.14.

In this case, since Florida law does mandate a full refund of taxes under a discriminatory tax scheme, this Court does not need to look

any further than Florida law to provide a remedy for McKesson's constitutional injury.

B. The Circuit Court's Declaration of Unconstitutionality Warrants the Remedy of a Refund.

The Circuit Court erred in declaring that its holding, striking the unconstitutional portion of the statutes, would operate only prospectively in this case. The Circuit Court may not deny relief to McKesson, which has timely pursued its challenge to the statutes. Florida may not, consistent with state law, retain the benefits of its unconstitutional tax scheme.

In *State ex rel. Nuveen v. Greer*, 88 Fla. 249, 102 So. 739 (1924), this Court articulated the traditional rule regarding the effect of a court's holding a statute unconstitutional:

> [W]hen an act of the Legislature is duly held to be invalid because in conflict with express or implied provisions of the Constitution, it is invalid from its enactment, and not from the date of the decision adjudging its invalidity. . . .

Id. at 744. The Court noted that once a court determines that a statute is invalid, "the Constitution then operates to make the statute void from its enactment," and the court cannot restrain the Constitution's operation. *Id.* at 745.

The *Nuveen* Court, however, recognized that there may be an exception to the traditional rule where an appellate court had, at one point, declared a statute valid under the Constitution and, after persons had acquired rights in reliance on the court's opinion, a later court overruled the former opinion and declared the statute unconstitutional. The Court noted that the law may protect rights acquired under such circumstances. *Id. See also Florida Forest and Park Service v. Strickland*, 154 Fla. 472, 18 So.2d 251, 253 (1944).

This Court later recognized a further exception to the traditional rule in *Gulesian v. Dade County School Board*, 281 So. 2d 325 (Fla. 1973). In *Gulesian*, the Circuit court had declared invalid under the Florida Constitution a particular tax collection levied for Dade County schools. However, the Court denied a tax refund to the plaintiff class, which included more than 350,000 persons. The Court noted that the school board had adopted the particular tax levy in good faith reliance on a presumptively valid state statute and that requiring a refund in small amounts to over 350,000 Dade County taxpayers, who had paid the tax without protest, would impose an intolerable burden on the school board. The Supreme Court, agreeing with the trial court's reasoning, affirmed.

Appellants, cannot benefit from the two exceptions.

First, in contrast to *Nuveen*, the State cannot assert that, at an earlier date, a court had declared the Revised Florida Products Exemption valid under either the United States Constitution or the Florida Constitution. Therefore, the State cannot argue that any person has acquired property or contract rights by relying on a prior authoritative judicial declaration of constitutionality, before a later finding of unconstitutionality.

Second, in contrast to *Gulesian*,[9] McKesson's constitutional injury warrants a monetary remedy. Unlike the Dade County School Board, which relied, as it must, on legislative authorization, the State in this case did not *rely* on invalid statutes but rather *enacted* the unconstitutional statutes. Further, the State acted after the United States Supreme Court's holding in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), as well as this Court's holding in *Delta Air Lines, Inc. v. Department of Revenue*, 455 So.2d 317 (Fla. 1984), plainly circumscribed the State's ability constitutionally to promote local industry. Indeed, the Florida Department of Business Regulation warned in a memorandum that the Revised Florida Products Exemption continued the unconstitutional discriminatory effect of the Florida Products Exemption, which the revised scheme replaced.

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[9] In *Coe v. Broward County*, 358 So. 2d 214, 216 (Fla. 4th DCA 1978), the Court of Appeal, stating that a taxpayer normally is entitled to a refund of taxes paid pursuant to an unlawful assessment, suggested that the holding in *Gulesian* represents a narrow exception.

(A. 479-85.) Unlike the 350,000 taxpayers in *Gulesian* whose school taxes were only slightly higher than they should have been, McKesson, which paid the taxes under protest, has incurred a substantial constitutional injury under the discriminatory tax scheme.

Thus, this Court should apply the retroactive-prospective doctrine that this Court has structured in a series of cases and provide a refund remedy for the constitutional injury to those taxpayers who actually filed the suit challenging the validity of the tax scheme. *See City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1, 7 (Fla. 1972), *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So.2d 993, 995 (Fla. 1976), *Osterndorf v. Turner*, 426 So.2d 539, 541, 545 (Fla. 1982), *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984), and *Colding v. Herzog*, 467 So.2d 980, 983 (Fla. 1985). In *Osterndorf v. Turner*, 426 So.2d 539, 545 (Fla. 1982), this Court held unconstitutional a statute granting an enhanced homestead exemption to long-term Florida residents but not to others. This Court made its ruling prospective, but added --

> The petitioners in this case, however, are entitled to a refund of the amount of additional taxes they paid by reason of the denial of the enhanced exemption, as are any other litigants who have timely judicially challenged the statute.

McKesson, which has timely judicially challenged the Revised Florida Products Exemption, is entitled under Florida law to receive an appropriate refund.

CONCLUSION

McKesson respecfully [sic] asks this Court to end Florida's violation of the federal Constitution's proscriptions by, first, affirming the Circuit Court's declaration of unconstitutionality and, second, directing the Circuit Court to award McKesson a tax refund of the difference between what McKesson paid in taxes and what McKesson

would have paid if its products had received the same treatment as the favored products.

Dated: May 14, 1987

Respectfully submitted,

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(Certificate of Service omitted in printing)

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 70,368

(Caption omitted in printing)

REPLY BRIEF OF THE DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION

(Table of contents and table of authorities omitted in printing)

ARGUMENT

I
THE PRODUCT CLASSIFICATIONS OF THE STATUTES UNDER SCRUTINY DO NOT VIOLATIVE THE COMMERCE CLAUSE

In analyzing the statutes for consistency with the Commerce Clause, it is abundantly clear that the decision by the Florida Legislature to classify alcoholic beverages manufactured from sugarcane, citrus and selected grape species does not violate the Commerce Clause.

Appellees' laborious arguments to the contrary, the United States Supreme Court has been careful to point out that holdings finding discrimination with regard to taxation do not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry". *Boston Stock Exchange v. State Tax Commission*, 97 S.Ct. 599, 610, (1977); *See also*, *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed. 2d 200 (1984). The central thesis of Appellees' argument that the product classifications - as distinguished from the disqualification provisions of the statutes - discriminate against interstate commerce is stated in page 37 of McKesson's Answer Brief:

> Florida's desire to nurture local industry represents an attempt to further a purely economic purpose that - whether the implementation is non-discriminatory or not - is constitutionally suspect under the Commerce Clause.

That premise is the direct antithesis of the Supreme Court's caveat quoted above. It is clear, upon a moment's reflection, that the product classifications themselves do not in any way discriminate, within the meaning of Commerce Clause cases. The classification of those products for favorable tax treatment are thus clearly valid under cases such as *Exxon Corp. v. Governor of Maryland*, 98 S.Ct. 2207, 57 L.Ed. 2d.91 (1978). That the operation of the classifications may "cause business to shift from one interstate supplier [for example grain based alcoholic beverages] to another interstate supplier [sugarcane based or citrus based alcoholic beverages] does not violate the Commerce Clause". That clause "protects the interstate market, not particular interstate firms..." *Exxon Corp. v. Governor of Maryland*, *supra*, 98 S.Ct. 2214-2215. Indeed, if the Appellees' were correct that the State of Florida may not classify alcoholic beverages according to product base for different tax treatment, then the entire tax structure of Chapter 565 and Chapter 564, Florida Statutes - and that of virtually every other state in the Union - is invalid. If the mere classification of beverages for different tax treatment according to the type of beverages is unlawful because it somehow disadvantages agricultural producers of various base materials, then the State may not tax beer at a rate different from the rate at which it taxes distilled liquors. To do so would, according to Appellees' analysis, discriminate against the producers of raw agricultural crops in those states and nations which, because of climatic conditions, are not suited to the commercial growth of hops and malt, the preferred ingredients for the making of beer. Likewise, if Appellees' analysis is correct, neither the State of Florida nor any other state of the Union could impose a different tax rate on wines than on beer and distilled liquors, for the same reasons. Appellees' argument that the product classifications themselves result in prohibited discrimination under the Commerce Clause is clearly erroneous, constitutes a perversion of Commerce Clause precedents, and ought not be adopted by this Court.

II

THE APPELLEES DID NOT DEMONSTRATE BELOW THAT THE DISQUALIFICATION PROVISIONS OF THE STATUTES RESULT IN A COMMERCE CLAUSE VIOLATION

The Appellees argue that the disqualification provisions contained in §564.06(9) and 565.12(1)(c), (2)(c), Florida Statutes (1985) are discriminatory in purpose and, on that ground alone, are in violation of the Commerce Clause. In essence Appellees argue for a pure motive analysis, the contention that the motives of the Legislature alone, if discriminatory, are sufficient to invalidate the statutes.

However, although pure motive analysis has been argued by some scholars, the United States Supreme Court has not adopted a pure motive standard for the invalidation of a statute under the Commerce Clause. Indeed in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 528(1937) the Court held that: "motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful". In the years ensuing the Supreme Court has not retreated from that position. There is dictum in the *Bacchus* case which indicates that motives could be a sufficient basis for invalidation of a statute. However, the holding in *Bacchus* is as follows:

> We therefore conclude that the Hawaii liquor tax exemption for okolehao and pineapple wine violated the Commerce Clause because it had *both the purpose and effect* of discriminating in favor of local products.

104 S.Ct. 3049, 3057 (emphasis supplied).

Whatever the United States Supreme Court has said in dicta, it has not stricken a statute purely on the basis of motivations of legislators in its enactment. In each case there was either facial discrimination *de jure* or discrimination in practical effect, demonstrated by evidence adduced in the record.

In this case there is simply no evidence in the record which demonstrates that the disqualification provisions of these statutes in practical effect discriminate against manufacturers of alcoholic beverages produced from sugarcane, citrus or the grape species in states and jurisdictions other than Florida. There is no allegation, nor any evidence, that any manufacturer would be denied an exemptive license based upon the disqualification provisions. Indeed, there is evidence in this record that the Division of Alocholic (sic) Beverages and Tobacco would have granted such a license to an alcoholic beverage manufacturer outside the State of Florida had the application not been withdrawn by that manufacturer. Thus, upon the tests adopted in the holdings of Commerce Clause precedents, this record is wholly inadequate to determine that the disqualification provisions of these statutes render them discriminatory in practical effect.

Let us assume, however, for the purposes of argument that the Appellees (sic) "motivation only" analysis is appropriate. Even if that proposition were true, this record is insufficient to justify the trial court's granting of summary judgment based upon such an analysis. Appellees cite the comments of Senator McPherson and Representative Jones before legislative committees for the proposition that the motivation of the Legislature as a whole in enacting the disqualification provisions was discriminatory. What Appellees failed to bring to the Court's attention, however, is that even the most dedicated proponents of pure motivation analysis under the Commerce Clause concede that discriminatory motivation on the part of a few legislators is insufficient to establish discriminatory motivations on the part of the legislature as a body. *E.g.*, Regan, D. H. "The Supreme Court And State Protectionism: Making Sense Of the Dormant Commerce Clause", 87 Mich. L. Rev. 1091, 1149 (1986).

For every statement by Senator McPherson and Representative Jones which evinces discriminatory intent on their parts, this record contains statements by other members of the legislature evincing clearly non-discriminatory intent. For instance in the hearings on May 14, 1985 before the Senate Finance and Taxation Committee of the Florida Legislature the chairman of that committee indicated his desire to modify Florida's tax preference to meet the constitutional

requirements announced in *Bacchus*. He recognized, however that in doing so, a formula was needed to prevent an erosion of the beverages excise tax base which would follow on expansion of the tax preference to meet *Bacchus* concerns.[1]

The discussion between the Chairman of the House Finance and Taxation Committee and Representative Jones at the May 8, 1985 Committee hearing demonstrates the clear belief of the Chairman that the statute, as amended, would open the tax exemption to non-Florida manufacturers, thus triggering the Chairman's concern that a formula be adopted which would limit the erosion of the tax base by creating a sliding scale tax. R. Vol. 1, pp. 149-153.

Indeed, the clearest indication that the Florida Legislature, as a whole, believed that the new Acts would expand the availability of exemption to non-Florida manufacturers is found on the face of the statutes themselves. §564.06(10) and §565.12(5),(6), Florida Statutes, (1985) contain lengthy and carefully drafted sliding scale tax rates designed to place a floor under the erosion of the tax base which would be occasioned by the unchecked growth of manufacturers selling exempt products in the state. Those provisions constitute, in fact, the bulk of the statutory language of §§564.06 and 565.12 as amended. A comparison of §§564.06 and 565.12, Florida Statutes, (1985) with the pre-existing statutes reveals that the earlier statutes contain no such formula capping the amount of taxes which would be lost as a result of the exemptions. The ineluctable reason for the existance (sic) of the sliding scale tax in the new statutes and its non-existance (sic) in the prior statutes is a legislative perception that the new statutes would, indeed, expand the availability of the exemption to manufacturers outside the State of Florida who theretofore had been

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[1] THE CHAIRMAN: "What I'm trying to do is keep the exemption for distillers in effect. And what has happened in the Supreme Court in the *Bacchus* case is that has made the ruling that would tend to jeportize our existing language...What this attempts to do would be to redraw it, the same basic dollar amount, the same concept, but make it so that its constitutional". R. Vol. I, p. 179.

See also, the statement of the Chairman of the Senate Commerce Committee at R. Vol. I, p. 177-178.

denied that exemption. On the face of the statutes, then, the clear inference is that the motivation of the legislature in enacting these statutes was not discriminatory.

Thus, even if one fully accepts the "motivation" analysis put forward by Appellees, the inferences in this record are wholly in conflict. The cases are not capable of resolution by summary judgment. The proponents of motivation analysis concede that the courts must look to a statute's practical effect in many cases for evidence of discriminatory motivation on the part of the legislature as a whole. *E.g.*, Regan D. H. "The Supreme Court And State Protectionism: Making Sense Of The Dormant Commerce Clause", *supra* at 1137. On this record, conflicting inferences as to the motivation of the legislative body as a whole exist. To resolve that conflict, the trial court was required to look into the statutes' practical effect. This record is wholly lacking in evidence which would demonstrate that the practical effect of these laws is to operate in a discriminatory fashion against beverages manufactured in foreign jurisdiction. The trial court's final orders in these cases indicate a belief that the motivation of the legislature in enacting the 1985 amendments was not discriminatory. The following paragraph appears identically in each of the court's final orders:

> These amendments were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverage laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

Final order on Summary Judgment R. Vol. 8, p. 1458. Reflection upon that passage demonstrated no hint that the trial court made a factual finding of discriminatory motivation on the part of the Florida Legislature in adopting the 1985 amendments to these statutes. Without such a finding of the trial court, with conflicting inferences in this record, and with the dearth of information about the statutes' practical effect, judgment for Appellees is wholly inappropriate.

III

SUMMARY JUDGMENT ON THIS RECORD IS INAPPROPRIATE

Before addressing the remaining issues presented in Appellees answer briefs DABT believes it would be instructive to explain its general position that the trial court erred in granting summary judgment. The state of this record has implications not only for standing, with respect to challenge of the disqualification provisions by McKesson Corporation, Florida Beverage Corporation and Tampa Crown, but also with respect to discrimination analysis under the Commerce Clause. Further, the lack of proof and opportunity for inquiry as to the practical effect of these statutes in the record precludes the grant of summary judgment on any theory advanced by Appellees. At bottom, Appellees' theories, other than the facial challenges fall into two general categories: (1) that the disqualification provisions intrude into areas of foreign policy (2) that the disqualification provisions have been preempted by positive Federal enactments. Those challenges must proceed upon an as-applied analysis of the sphere of operation of the disqualification provisions, their true effects in practice, and the intent of Congress and the Federal Government. They depend upon the facts asserted to exist in Appellees briefs, but which find no support from admissible evidence in the record below, as does the standing of Appellees.

For instance at page 12 to 13 of McKesson's Answer Brief at footnote 1 there is a discussion by McKesson of factual grounds which McKesson asserts would operate to deny exemption to Mt. Gay Rum which McKesson imports from Barbados. In support of its position, McKesson asserts as follows:

> Mt. Gay Rum, a sugarcane product, would qualify for the tax preference under section 565.12 (1)(b), Florida Statutes (1985), but for the Take Back Provisions...In addition, a Barbados government agency, the Barbados Export Promotion Corporation, provides economic advantages to Barbados rum manufacturers. Therefore, under the Take

> Back Provisions, McKesson's [rum]... is ineligible to receive Florida's unconstitutional tax break.

There is no reference whatsoever in the record below to the existence of the Barbados Export Promotion Corporation or any description of the alleged economic advantages which it grants to Barbados rum manufacturers. There is no proof in the record below that Barbados offers to its manufacturers the sort of economic incentives or other direct or indirect subsidies which would disqualify that rum from receiving tax preferred treatment in the State of Florida. Florida Statutes §90.202 (3) and §90.204 establish the procedure whereby these Appellees might have established the existence of foreign law. There was no request for judicial notice as to the laws of Barbados put forward by Appellees pursuant to those provision of Florida's evidence code and the Court did not in its final order take judicial notice of the provisions of the laws of Barbados or any other foreign nation. The Peck affidavit, R. Vol. I, pp. 103 - 110, does not establish that affiant's expertise in and qualifications to render an opinion as to the provisions of Barbados law. Therefore, the factual assertion which underpins McKesson's assertion to this Court that it has standing to challenge disqualification provisions is wholly without support in the record below.

Appellees' assertion that the disqualification provisions of the statutes constitute discrimination under the Commerce Clause, under the Import/Export Clause, and result in impermissible intrusion into foreign affairs all depend in part upon a finding that the practical effect of the statutes is to discriminate against foreign commerce or to clearly create a foreign affairs problem. *E.g., Department of Revenue v. Association of Washington Stevedoring Co's.*, 435 U.S. 734, 98 S.Ct. 1388 (1978); *Container Corp. of America v. Franchise Tax Bd.*, 103 S.Ct. 2933 (1983). Appellees repeatedly assert that, in fact the practical effect of these statutes is to create such discrimination. At page 22 of its brief McKesson asserts that the exemptions "favor Florida producers". Again at page 28 McKesson asserts as a factual matter:

> Florida's overriding purpose for its alcoholic tax scheme is to encourage the sale of Florida products at the expense of non-Florida products.

Again, at page 36, McKesson asserts as a factual matter that the effect of the statutes is to impose a barrier against out-of-state producers by imposing additional taxes on *every producer* who does not produce Florida's products.

As demonstrated above, there is absolutely no proof that the practical effect of the statutes are as Appellees assert them to be. The central underpinning of Appellees' theories before this Court is thus without factual support in the record below and summary judgment based thereon is clearly inappropriate.

As pointed out in the initial brief filed by DABT, there is in this case a ripeness problem. It becomes evident when one examines the arguments of Appellees. At page 48 of McKesson's answer brief McKesson makes an interesting statement:

> Florida's *potential* denial of these preferences to Caribbean rum would frustrate federal policies expressed in CBERA.

The use of the word "potential" was not mistaken; it was deliberate. McKesson uses that word in its brief because it must concede that there is no proof in this record that the Florida statutes would deny tax preferences to manufacturers in any Caribbean Basin nation. Nor is there any proof in this record that the disqualification provisions would operate to deny tax preference to a manufacturer in any foreign nation.

Therefore the record is insufficient to support that critical finding.

The prematurity of summary judgment based upon the inability of Defendants to complete discovery and the lack of a complete factual record is apparent. That error by the trial court infected the proceedings in their entirety.

Tampa Crown and Florida Beverage argue that, as to them, entertaining a motion for summary judgment was not premature. DABT would agree that if the Tampa Crown case had been handled in isolation, entertaining the motion in that case might not have been premature. However, as DABT noted in its initial brief, the trial court did not treat these cases separately. Instead DABT was required to meet not only the contentions raised by Tampa Crown at the summary judgment hearing, but the contentions of McKesson Corporation was (sic) well and, shortly thereafter, of Brown-Forman Corporation. The time and resources of DABT available to adequately prepare its defense in each case was thus divided by three. Moreover, although Tampa Crown argues that its case is purely a facial challenge to the statutes, it in fact engages in speculation as to what effect the statutes might have, without the benefit of any administrative or judicial interpretation of the statutes as applied to a concrete circumstance.

McKesson's argument that DABT was required to file an affidavit in order to demonstrate the need for more time to complete discovery is the exaltation of form over substance. The lack of response to the majority of DABT's discovery was apparent in the record and was before the trial court on the date of the summary judgment hearing, at which time DABT made its need for additional time known to the trial court. When it is apparent on the record that discovery has not been completed, summary judgment is premature.

Moreover, DABT's discovery did not address only the (sic) standing (sic) McKesson's standing, as implied by McKesson. The record reflects that Florida Beverage Corporation deals in the products exempted by these statutes and is therefore estopped to challenge the constitutionality of the very exemption it has enjoyed. R. Vol.. 7, pp. 1170 - 1195, 1209 - 1211. *Hess v. Mullaney*, 213 F.2d. 635 (9th Cir. 1954); *In Re Chicago, Milwaukee, St. Paul & Pac, R. Co.*, 713 F.2d. 274, 279 - 280 (7th Cir. 1983); *Wolfe v. Merrill Nat'l Lab., Inc.*, 433 F.Supp. 231 (M.D. Tenn. 1977); *McNulty v. Blackburn*, 42 So.2d. 445 (Fla. 1949). The record further reflects that Tampa Crown chooses not to deal in exempt products because it regards them as inferior. R. Vol. 7, pp. 1209 - 1211. Thus, Tampa Crown can not (sic) assert that its interests as a distributor are harmed in manner fairly

traceable to the operation of the exemptions. *E.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed. 2d. 700 (1982).

DABT propounded discovery to McKesson aimed at unearthing facts which would show that McKesson dealt in exempt products in the past, voluntarily discontinued such business, and had access to the distribution of exemption products currently, but chose not to distribute them. R. Vol. 1, pp. 8 - 10, 18 - 28. R. Vol. 2, pp. 229 - 248. Had DABT been permitted sufficient time to inquire into those areas, McKesson's complaint might, too, have been found to subject to estoppel. Still further, DABT's discovery inquired into whether McKesson had passed the financial burden of the taxes to its customers and therefore not suffered the burden of the tax itself. If so, McKesson would be barred from seeking a refund. *State ex. rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d. 529 (Fla. 1973). Further, such facts would favor the trial court's prospective-only ruling, which is the subject of McKesson's cross-appeal. *Metropolitan Life Ins. Co. v. Commissioner of Ins.*, 373 N.W, 2d. 399, 408 - 411 (N.D. 1985).

IV

SUMMARY JUDGMENT BASED UPON ALLEGED INTRUSION INTO FOREIGN AFFAIRS UNDER DORMANT COMMERCE CLAUSE ANALYSIS WAS PREMATURE

As the court indicated in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, (1979), a case involving a Foreign Commerce Clause challenge to the California ad valorem tax on shipping containers, the basic analysis under the Foreign Commerce Clause tracks the four-prong inquiry used in the interstate context. The court identified two other factors that must be considered: "The enhanced risk of multiple taxation" in the international context (441 U.S. 446), and the possibility that state tax "may impair federal uniformity in an area where federal uniformity is essential" (Id. 448). There is no risk of multiple taxation in this case. The only inquiries then are whether there is discrimination against foreign commerce, which, as

demonstrated above, cannot be shown on this record, or whether the Florida law somehow impairs federal uniformity in an essential area.

In actually applying the "one voice" notion, the Supreme Court has recognized that the principal inquiry to be made is whether the federal government has chosen to mark out an area for uniform treatment through the exercise of its powers of preemption. However, where the federal government has not preempted state action, the courts should be hesitant to fashion their own version of preemption based solely upon the idea of "one voice" over foreign commerce. The decision in *Japan Lines* says nothing to the contrary on that issue.

It should be noted that the "one voice" standard suffers from the same central defect as the concept of "uniformity": it speaks only to one side of the balance at stake. As is the case in the field of interstate commerce, virtually any tax affecting foreign commerce can be said to affect uniform federal treatment and thus, under a rigid application the "one voice" principle, be impermissible. But that analysis ultimately does nothing more than restate the essential question, which is whether the tax so interferes with the need for one dominate (sic) power that it cannot stand. The answer to that question depends upon a sensitive balancing of the interests involved.

The Supreme Court, in fact, has recognized as much in *Container Corp. v. Franchise Tax Board*, 103 S.Ct. 2933 (1983). There the Court stated that, even absent preemption, the uniformity principal would be violated if the state tax "implicates foreign policy issues which must be left to the Federal Government." 103 S.Ct. 2955. However, the Court expressly cautioned that such foreign policy concerns had to be balanced against the "sovereign right of the United States as a whole to let States tax as they please". *Ibid.* The court in *Container Corp.* concluded that the balance in that case must be struck in favor of permitting the state to exercise its taxing power. The Supreme Court has also acknowledged that the "one voice" doctrine, if applied as strictly as Appellees urge, will lead the courts into difficult and uncertain inquiries. Thus, the court noted in *Container Corp., supra*, that it has no special competence "in determining precisely when foreign nations will be offended by particular acts, and .... in deciding

deciding how to balance" ...foreign policy concerns against state taxing power. 103 S.Ct. at 2955. The problem is even more difficult when the issue arises, as it does here, in the context of garden variety commercial litigation. In cases like this one, the foreign policy concerns of the United States will often be presented by a taxpayer simply seeking to avoid a tax or to achieve a tax advantage rather than by the United States on its own behalf. The line between private economic concerns and foreign public policy concerns is thus particularly troublesome to discern. In the usual order of analysis, as is the case here, the courts will be faced with the argument that a state tax conflicts with "one voice" principle only after the parties have exhausted an attempt to show that the tax is discriminatory or not fairly apportioned. In such circumstances, it would be a rare case where the impact of the tax is so harmful to federal foreign policy on its face that it can not (sic) be said to co-exist with that foreign policy.

Thus, to hold that the Dormant Commerce Clause of its own force prohibits a state tax under the "one voice" analysis, the court should require, at a minimum, proof in a concrete context of how the tax truly interferes with important federal policy and, if so, why Congress or the Executive Branch has not taken steps to preempt the State's policy.

This case involves the exercise of the taxing power of the State of Florida on a subject over which the Twenty-first Amendment to the United States Constitution gives it broad latitude. Appellees therefore ought to be at least required to prove in a concrete circumstance their claim that the tax, as it operates, intrudes into an area where federal uniformity is "essential". There is nothing in this record of a concrete nature showing that the tax policy of the State of Florida cannot co-exist with Federal policy or causes any concrete threat of retaliation from foreign governments, which is the core concern behind the "one voice" doctrine. That analysis must be made on an as-applied basis. There is no proof in this record that the product of any foreign nation is or will be denied tax preferred status by reason of the disqualification provisions. If there is a specific circumstance in which the internal tax policy of Florida impinges upon federal foreign policy or Congressional acts regulating trade relations with foreign nations, then the issues are properly adjudicated in a proceeding which

such concrete facts. The Court should not accept appellees' invitation to speculate upon them here.

V

APPELLEES MAY NOT RELY UPON THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) NOR DO THE FLORIDA STATUTES CONTRAVENE GATT

The United States Congress has never ratified GATT. *U.S. v. Yoshida International, Inc.*, 526 F.2d 560, 575, n. 22(C.C.P.A. 1975). GATT is therefore not a treaty of the United States. *See Republic of Argentina v. City of New York*, 250 N.E. 2d 698 (NY 1969). Further, GATT does not by its terms confer a private right of action on nationals of the United States. Thus, even if one assumes that GATT creates a private right of action for its enforcement, such right would be available only to foreign nationals. Appellees are "not in the position to invoke the rights of other governments or the nationals of other countries" under GATT. *Skiriotes v. Florida*, 313 U.S. 69, 74 (1941); *Hjelle v. Brooks*, 377 F.Supp. 430 (D. Alaska 1974).

Further a treaty or international agreement may confer rights capable of enforcement by private parties, but this is not the general rule. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F. 2d. 1287, 1298 (3rd Cir. 1979). Unless a treaty or international agreement is self executing it must be implemented by legislation before it can give rise to a private cause by action. *Dreyfus v. Von Finck*, 534 F.2d. 24, 29 (2d Cir. 1976), *cert. den.* 429 U.S. 835 (1976). Article XXIV, section 6 of GATT, TAIS 1700, provides:

> Each contracting party shall make such reasonable measures as may be available to it to assure observance by the regional and local governments and authorities within its territory.

That is exactly the same kind of provision, contemplating legislative action to implement the international agreement, that was held to be non-self-executing in *Mannington Mills, Inc. v. Congoleum Corp., supra.*

Therefore these Plaintiffs may not rely upon GATT in support of their position.

Moreover Article III; section 2 of GATT provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

On their face the provisions of Florida's disqualification provisions impose no more stringent rules or regulations upon the receiving of a tax preference with regard to the articles of foreign commerce that are applied to the articles of national commerce and, accordingly, do not violate GATT.

VI

THE RECORD IS INSUFFICIENT TO SHOW THAT THE STATUTES' PRACTICAL OPERATION IS REPUGNANT TO THE POLICIES OF THE SPECIFIC ACTS AS CITED BY APPELLEES

In order to (sic) Appellees to successfully argue that the disqualification provisions of Florida Statutes violate federal policy under the Tarrif (sic) Act of 1930 or the Trade Act of 1974, they must establish that the tax constitutes a protective trade barrier or, as Appellees phrase it, "an additional tax". McKesson answer brief at page 47. The statutes do not impose an additional tax on foreign commerce. They lay down conditions for the receipt of tax preference on the sale of beverages in Florida. For Appellees to successfully

prove that the tax is a protective barrier, it must be demonstrated that the tax in practical effect discriminates in favor of Florida products over foreign manufactured beverages. As demonstrated above, there is no proof of that in this record sufficient to warrant summary judgment.

There is no "irreconcilable conflict with federal regulation" under the Trade Act Of 1974 or the Tariff Act Of 1930 in Florida's taxation of beverages sold locally within its boundaries. There is no positive repugnancy between the policy embodied in those federal acts and Florida's decision to extend favorable tax treatment to beverages only if not being advantaged already. There is no express mandate in those Federal Acts that Congress intended to oust the powers of the states over the tax policy with respect to alcoholic beverages under the Twenty-first Amendment. *E.g. Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 81, 83 S.Ct. 1210(1963). Moreover, had the trial court determined that there was a preemption of the State's taxing policy insofar as matters of foreign trade are regulated by the Caribbean Basin Recovery Act or the Wine Equity And Export Expansion Act of 1984, such a determination would be insufficient to declare the statute unconstitutional on its face. Rather such a holding would have been an as-applied ruling, holding the disqualification provisions to be inapplicable in the case of trade covered by those Federal Acts. The trial court made no such determination. Instead the Court ruled the exemptions unconstitutional across the board.

Clearly, even if Plaintiffs had built a sufficient record to allow summary judgment on the pre-exemption issues, such would be insufficient to support summary judgment striking the exemptions on their face and across the board.

VII

THE DISQUALIFICATION PROVISIONS SHOULD BE CONSTRUED TO AVOID POINT-OF-ORIGIN DISCRIMINATION

Tampa Crown labors to establish that the disqualification provisions of §§564.06(9), 565.12(1)(c), (2)(c), Florida Statutes (1985) result in

(1985) result in facial "point-of-origin" discrimination. Tampa Crown's argument proceeds however upon its unstated assumption that those provisions are capable of only one construction - i.e. the interpretation put forward by Tampa Crown. Tampa Crown merely sets up a strawman so it can knock it down., Instead of the suspect interpretation put-forward by Tampa Crown, the Court should adopt any construction which avoids constitutional problems. *Biscayne Kennel Club v. Florida State Racing Comm'n* (165 So.2d. 762 (Fla. 1964); *Tyson v. Lanier*, 156 So. 2d. 833 (Fla. 1963).

The provisions of the disqualification provisions reflect the reasonable inference that if direct or indirect subsidies are made available in a given jurisdiction, manufacturers will avail themselves of such benefits. A manufacturer making rum in a jurisdiction which offers export subsidies to rum made from local sugarcane is not likely to choose, instead, to import sugarcane from elsewhere and pay a higher price plus shipping costs. Thus, the language of the disqualification provisions is readily capable of the interpretation which does not hinge the Florida tax preference solely upon the policies of the manufacturing jurisdiction without regard to whether the manufacturer actually receives the benefit of those policies. One of the disqualifying criteria is applied to beverages from jurisdictions "*which provide* agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries." §564.06(9)(b), Fla. Stat. (1985). It is reasonable to construe that language to mean that such advantages must actually be provided to the manufacturer seeking Florida's preference in order for the disqualification to operate. Given that construction, the disqualification is not based upon some general policy of the other jurisdiction, but upon provision of financial benefits directly to a specific manufacturer which is seeking further tax encouragement here. The provisions of §564.09(c), Fla. Stat. (1985) are equally amenable to the same interpretation. The provisions of §564.09(a) can also be interpreted as operating not just upon a point-of-origin basis, but upon the actual receipt of financial incentives elsewhere. If a jurisdiction provides home territory trade protection to its manufacturers, all of those manufacturers necessarily enjoy a financial encouragement in the home market which allows them to compete

more effectively elsewhere; they may export that incentive by lowering prices on products they export, since products they sell locally can be priced higher due to protection from outside competition. Thus, the disqualification operates not on the point-of-origin, but upon the actual receipt of financial encouragement by the manufacturer.

Similarly, when one bears in mind the duty to seek a constitutional interpretation of legislative enactments, Tampa Crown is incorrect in stating that a de minimis benefit elsewhere would operate to deny Florida tax preference. Clearly the foreign benefit must be substantial to deny tax preference here. That the statute does not contain a formula for mathematical equivalence is not surprising. The value of a price support or an export subsidy (or a tax barrier in another local market) fluctuates depending upon overall market conditions. No formula is available to cover such constant fluctuations. The inability to create symmetry and balance, or a precise formula does render the statute unconstitutional *See Straughn v. K & L Land Mgt., Inc.*,326 So. 2d. 421 (Fla. 1976); *Askew v. Cross Key Waterways*, 372 So.2d. 913, 919 (Fla. 1979).

The decision in *Askew v. Cross Key Waterways*, is also instructive with regard to Appellees' assertion that the language of the disqualification provisions is too broad and therefore constitutes an invalid delegation of legislative power:

> We emphasize that it is not the legislature's use of the phrases "containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional impact" nor "significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment" which faults the legislation. Although the Court in *Sarasota County v. Barg*, supra, invalidated an act which utilized the terms "undue or unreasonable" dredging or filling and "unreasonable" destruction of natural vegetation in a manner which would be "harmful or significantly constribute (sic)" to air and water pollution, such quantitative assessments by an administrative agency are not necessarily prohibited. As suggested by the

> district court of appeal such "approximations of the threshold of legislative concern" are not only a practical necessity in legislation, but they are now amenable to articulation and refinement by policy statements adopted as rules under the 1974 Administrative Procedure Act, Chapter 120, Florida Statutes. The benefits of the current version of Chapter 120 were not available at the time of the *Barg* decision. The deficiency in the legislation here considered is the absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest.

Id. at 919. *See also, Straughn v. K & K Land Mgt., Inc., supra* (upholding provision for denying agricultural tax break under certain circumstances unless the property owner can show "special circumstances demonstrating that the land is to be continued in bona fide agriculture.")

Under the analysis of those cases, the provisions of the instant statutes relating to disqualifying criteria are sufficient "approximations of the threshold legislative concern": to limit the loss of tax revenue where the manufacturer of an otherwise qualifying beverage has already received financial encouragement to market it. As the Court noted in *Askew v. Cross Key Waterways*, that threshold standard may be fleshed out in administrative regulations and §120.57 proceedings. Those mechanisms are adequate to determine whether a manufacturer has in fact benefitted from financial advantages elsewhere and, if so, whether that benefit is substantial or insubstantial. Administrative Agencies and the courts, *see* §120.68, Fla. Stat., are as equally equipped to make those determinations as they are to decide the degree of contributory fault in a tort case or "The probable economies and improvements in service be derived from operation of joint or shared h(sic) are (sic) resources.", §381.494(6)(c) 5., Fla. Stat. (1985).

VIII

ASSUMING THE TRIAL COURT'S CONSTITUTIONAL RULING TO BE CORRECT THE TRIAL COURT PROPERLY GAVE ITS RULING ONLY PROSPECTIVE OPERATION

The arguments DABT is about to make will demonstrate that the reasoning and the precedents relied upon in McKesson's cross-appeal as to the prospective-only ruling below are inapposite. Before doing so, however, DABT, wishes to point out that the argument over whether the trial court's ruling should or should not be given only prospective effect is largely academic, because even if the trial court had not expressly made its ruling prospective, McKesson would not be entitled to a refund of beverage excise taxes. McKesson has not challenged the imposition of the flat beverage tax, but rather only the alleged discriminatory effect of the tax preference provisions of §564.06 and §565.12. Thus, if the trial court's constitutional analysis were correct, only the exemption provisions are invalid and those exemptions were properly severed from the statute, as the trial court did. *Delta Airlines, Inc. v. Department of Revenue, 455 So.2d 317, 321 (Fla. 1984), Presbyterian Homes of Synod of Florida v. Wood,* 297 So.2d. 556, 559 (Fla. 1974). With the exemptions removed, all beverage distributors are responsible for collecting and remitting the beverage excise taxes at the higher rate. McKesson cannot assert the exemptions to be unconstitutional and at the same time demand their benefit by demanding a refund of taxes paid in excess of the exempt rate. *See, e.g. Daniel v. Canterbury Towers, Inc,* 462 So.2d. 497 (Fla. 2d. DCA 1985). McKesson cannot avoid that obvious inconsistancy (sic) by characterizing the refund claim as one for damages against the state for alleged injury to its business. A damage claim will not lie for fundamental acts of governance, including the enactment of legislation, *Trianon Park Condominium Ass'n v. City of Hialeah,* 468 So.2d. 912, 918 - 919 (Fla. 1985), and a tax refund claim cannot be made on such a theory, since it flies in the face of sovereign immunity. *Shannon v. Hughes & Co.,* 270 Ky. 530, 109 S.W. 2d. 1174 (1937).

Having said that, DABT asserts that the trial court was amply justified in giving prospective-only effect to its judgment, assuming that judgment to be correct.

The decision in *Great Northern Ry. Co. v. Sunburst Oil Co.*, 287 U.S. 358 (1932), laid to rest the debate over the power of the courts to fashion their decrees on the constitutionality of statutes in such a manner that those decrees operate only prospectively. Since the advent of the *Sunburst* doctrine, scores of decisions, both in the Federal courts and in the courts of the several States, have been given only prospective operation, thus denying retroactive relief such as a refund of monies paid to a State's treasury under statutes found to have a constitutional defect. *E.g., Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463 (1973); *Gulesian v. Dade Cty. Sch. Bd.*, 281 So.2d 325 (Fla. 1973); *International Studio Apt. Ass'n v. Lockwood*, 421 So.2d. 1119 (Fla. 3d DCA 1982) *pet. for rev. den.* 430 So.2d. 451 (Fla. 1983), *cert. den.* 464 U.S. 895 (1983); *Metropolitan Life Ins. Co. v. Commissioner of Ins.*, 373 N.W. 2d. 399 (N.D. 1985). This Court has done so. *E.g., Gulesian v. Dade County Sch. Bd., supra.* Of the numerous cases which have discussed and applied the *Sunburst* doctrine, the most succinct analysis of the rationale for it and the circumstances conducive to its application can be found in *Lemon v. Kurtzman, supra*, and in *Metropolitan Life Insurance Company v. Commissioner of Insurance, supra.*

In *Lemon v. Kurtzman*, the court struck down a statute allowing public funds to be paid to sectarian schools to reimburse them for the expense of providing non-sectarian education. Nevertheless, the court gave its decision only prospective application, thus denying the plaintiffs' demand for a refund of monies paid under the unconstitutional scheme. The Court's reasoning is instructive here:

> Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs

> are 'ratified' by the federal courts or risk draconian, retrospective decrees should the legislation fall. In our view appellants' position would seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers. . . have the power to carry forward the directives of the state legislature...[W]hen there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review. We do not engage lightly in the post hoc evaluation of such political judgment, founded as it is on one of the first principles of constitutional adjudication - the basic presumption of the constitutional validity of a duly enacted state or federal law.

Lemon v. Kurtzman, supra, 411 U.S. 207-208, 93 S.Ct. 1473, 36 L.Ed. 165-166.

In Metropolitan Life Insurance Co. v. Commissioner of Insurance, supra, the Court held unconstitutional North Dakota's tax preference for domestic insurance companies. However, the Court refused to give retrospective application to its ruling, and denied the plaintiffs' demands for refunds of taxes previously paid under the statute. The decision in that case is nearly "on all fours" with this case. The North Dakota court denied tax refunds to the plaintiffs because: (1) the decision of the United States Supreme Court in *Metropolitan Life Insurance Co. v. Ward*, 105 S.Ct. 1676 (1985), which occasioned the North Dakota decision, constituted a newly announced principle of constitutional law and the state therefore was justified in relying upon the presumed constitutionality of the statute in question; (2) the State acted to address the constitutional defect announced in the *Ward* decision; (3) the prior statute had long been in effect without protest before the *Ward* decision; (4) serious economic dislocation for the state would have occurred by the imposition of retroactive relief; and (5) the plaintiffs had not shown real injury as taxpayers because they had shifted all or most of the financial burden of the tax to their customers in the form of higher prices and thus would receive an unjustified windfall by the granting of refunds.

Each of those considerations applies with equal, if not more compelling, force here.

A.

BACCHUS IMPORTS, LTD. v. DIAS WAS A NEW PRINCIPLE OF LAW

The majority holding in *Bacchus* was accompanied by a strong dissent which characterized the majority's decision as a clear departure from prior decisions and a "totally novel approach to the Twenty-first Amendment". *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 3064, 82 L.Ed. 2d. 200 (1984). That characterization is well supported. For decades prior to the *Bacchus* case, the United States Supreme Court had rebuffed Commerce Clause challenges to the State's taxation and regulatory laws which favored local alcoholic beverage industries, and did so on the express ground that the Twenty-first Amendment removed Commerce Clause strictures on the States in regard to the regulation of the sale and distribution of alcoholic beverages. *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U. S. 390 (1939). Thus, the *Bacchus* decision constituted a new principle of law. *See, Metropolitan Life Ins. Co. v. Commissioner of Insurance, supra; Gulesian v. Dade County Sch. Bd., supra, International Studio Ap't. Ass'n v. Lockwood, supra.*

B.

THE STATE JUSTIFIABLY RELIED UPON THE VALIDITY OF ITS TAX STATUTES

Just as North Dakota justifiably relied upon the long and unprotested existence of its tax format, *Metropolitan Life Ins. Co. v. Commissioner of Ins., supra*, Florida justifiably relied upon the taxation format for alcoholic beverage prior to *Bacchus*. Until the advent of *Bacchus* the general wisdom was that the Twenty-first

Amendment removed Commerce Clause restrictions on the States' taxation and regulation of alcoholic beverages imported into the States for consumption.

C.

THE STATE ACTED PROMPTLY AND REASONABLY IN RESPONSE TO BACCHUS

In the next ensuing legislative session after *Bacchus* the Legislature substantially amended the statutes to address what it perceived to be the Commerce Clause defect announced in *Bacchus* - the granting of an exclusively local tax preference to alcoholic beverages. In making that statement, DABT does not ignore the possibility of protectionist motives on the part of some legislators with regard to the 1985 amendments. However, as discussed above in point I, such motivations on the part of some cannot be said to be true of the body corporate. Nor does DABT ignore the fact that reasonable men may differ as to whether the 1985 amendments cured the constitutional defects announced in *Bacchus* and as to whether other constitutional problems may inhere in those amendments. What may not be disputed, however, is that the trial court, with the benefit of the record and exhaustive arguments of counsel, made a finding that the 1985 amendments "were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverage laws resulting from the *Bacchus* decision". Whether the Legislature succeeded or not, the trial court's finding supported by ample evidence, establishes the bona fides of the State in making the attempt. The State has thus satisfied the prompt action component of the prospective-only calculus.

It goes without saying that the pre-1985 statutes were not subject to any protest regarding their constitutionality and prior precedents amply supported the constitutional presumption for those laws. Nor did these plaintiffs act with any alacrity in asserting the new statutes to be unconstitutional. The 1985 amendments became effective July 1, 1985. McKesson - the only appellee to cross-appeal the prospective-only ruling - did not file suit until September, 1986. By way of a

comparative benchmark, the Court need only look to the current cases filed regarding the constitutionality of Florida's new sales tax on services.

D.

SERIOUS DISLOCATION WOULD OCCUR BY GRANTING RETROSPECTIVE RELIEF

There can be no dispute that the refund of millions of dollars from state revenues at a time when the State is struggling to find revenues to pay for billions of dollars in infrastructure needs would be a serious financial hardship. Record support for that conclusion is evident in the elaborate sliding scale tax for beverage tax exemptions designed to check erosion of the beverage excise tax base.

E.

MCKESSON MAY NOT ASSERT HERE THAT IT DID NOT PASS THE FINANCIAL BURDEN OF THE TAX TO ITS CUSTOMERS

The only piece of the calculus for prospectivity at all in question is whether McKesson passed the financial burden of the tax on and thus would receive a windfall by receiving a refund. Before addressing that issue, however, DABT wishes to note that such a finding, while sufficient to justify a prospective ruling, is not necessary to support the trial court's exercise if equitable discretion in granting prospective-only relief. Indeed, in *International Studio Apartment Ass'n v. Lockwood, supra*, the plaintiffs' financial loss was deemed insufficient reason to justify a retrospective ruling on constitutionality. *See also City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978).

Let us turn, now, to the financial burden of this tax. DABT propounded discovery to McKesson aimed at proving that McKesson had, indeed, passed the financial burden of the excise tax to its customers. R. *Vol. 1, pp. 229 - 248*. McKesson refused to respond to that discovery, despite the fact that it was clearly relevant to

McKesson's claim of refund. *State ex. rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1974). If that missing piece were error (it is not, as demonstrated above), McKesson, having invited it, may not now rely upon it for reversal of the trial court's prospective-only decision. *See, e.g., Stossel v. Gulf Life Ins. Co. of Jacksonville*, 123 Fla. 227, 166 So. 821 (1936).

Even without McKesson's response to that discovery, there is adequate support for the trial court's prospective ruling. The Legislature clearly contemplated that, although the legal incidence of the excise tax falls upon distributors such as McKesson, the distributors would be mere collection conduits for the tax. *See*, §561.50. Fla. Stat. (1985) (tax not due until sale); §561.506, Fla. Stat. (1985) (Wholesaler deductions from *tax collection* payments); §565.13 Fla. Stat. (1985)(tax not due until 10th of month following month of sale). Indeed, since a price given to one customer by a distributor must be given equally to all under Florida's regulatory scheme, Rule 7A - 4.471, F.A.C., and since the amount of the tax is large in relation to the relatively low unit price of alcoholic beverages ($9.53 per gallon on distilled spirits with more than 48% alcohol), economic necessity virtually compels a pass-through of the financial burden of the tax.

The cases McKesson relies on are inapposite. The Court in *Bacchus* made clear that the *Bacchus* decision did not consider the demand for refunds. 104 S.Ct. 3049, 3059. The case of *State Ex. rel Nuveen v. Greer*, 89 Fla. 249, 102 So. 739 (Fla. 1924) predates the decision in *Great Northern Ry. Co. v. Sunburst Oil Co., supra*. The *Sunburst* case eschewed the precedents relied upon in the *Nuveen* case. *Nuveen* is directly contrary to modern precedents on the prospective-only application of judicial decisions, both in Florida and in the Federal Courts. *Compare Lemon v. Kurtzman, supra; City of Los Angeles Dep't. of Water & Power v. Manhardt, supra; Gulesian v. Dade Cty. Sch. Bd., supra*. Modern Florida cases have allowed litigants to recover refunds only when the applicants bore the financial burden of the tax as end-consumers or property owners, in the case of

ad valorem taxes.[2] In contrast, this Court held that no refund is due in cases where the taxpayer, although being the one upon whom the legal incidence of the tax falls, is not the party who bears its financial burden. *State ex. rel Szabo Food Service, Inc. v. Dickinson, supra. Accord, Shannon v. Hughes & Co.*, 270 Ky. 530, 109 S.W. 2d. 1174 (Ky. 1937). As demonstrated above, that is precisely the circumstance of McKesson.

CONCLUSION

DABT urges the Court to hold that the 1985 amendments to §§564.06 and 565.12, Florida Statutes, do not violate the Commerce Clause, either facially or in practical effect; and to reverse the trial court's summary judgment. Further, DABT urges the Court to hold that the record does not support summary judgment on any alternative ground advanced by Appellees. In the alternative, DABT urges the Court to sustain the trial court's decision to grant prospective-only effect to its ruling.

Respectfully submitted

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2 *Ostendorf v. Turner*, 426 So.2d. 539 (Fla. 1982); *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So.2d 993 (Fla. 1976); *Colding v. Herzog*, 467 So.2d 980 (Fla. 1985); *City of Tampa v. Birdsong Motor, Inc.*, 261 So.2d. 1 (Fla. 1972); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d. 578 (Fla. 1984).

SUPREME COURT OF THE STATE OF FLORIDA

(Caption omitted in printing)

CASE NO: 70,368 ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA
CASE NO. BS-402

APPELLEE AND CROSS-APPELLANT MCKESSON CORPORATION'S REPLY BRIEF

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INTRODUCTION

McKesson[1] in the Circuit Court in October, 1986, argued that the Revised Florida Products Exemption impermissibly discriminates against interstate commerce in violation of the Commerce Clause, impermissibly involves Florida in foreign affairs, and impermissibly discriminates against foreign imports in violation of the Import-Export Clause. (A. 306-492.) The Circuit Court predicated its finding of unconstitutionality upon the Commerce Clause and, therefore, did not reach McKesson's other constitutional arguments. The Court stated that its declaration would operate only prospectively. (A. 278-80.)

Appellants' Initial Briefs only discussed McKesson's Commerce Clause argument and did not discuss the Circuit Court's decision to enter a prospective ruling. McKesson, in its Answer Brief, responded to Appellants' arguments concerning the Commerce Clause, addressed McKesson's other constitutional arguments, and criticized the Court's prospective ruling. Appellants, in their Reply Briefs, responded for the first time to all McKesson's Circuit Court arguments. In accordance with this Court's Rules, McKesson assumes that it cannot respond to Appellants' arguments concerning the Commerce Clause in this Reply Brief and directs this Court to its Answer Brief. McKesson assumes that it may address Appellants' new arguments in this Reply (within the 15 page limitation).

Therefore, in responding to Appellants' new arguments, McKesson, in this Reply, discusses the Florida statutes' unconstitutional interference in foreign affairs; the Florida statutes unconstitutional discrimination against foreign imports; and the Circuit Court's error in declaring that its ruling would operate only prospectively.

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[1] McKesson adopts in this Reply the abbreviations that it used in its Answer.

I. THE REVISED FLORIDA PRODUCTS EXEMPTION INTRUDES IMPERMISSIBLY INTO THE EXCLUSIVELY FEDERAL AREA OF FOREIGN AFFAIRS.

McKesson maintains that the Revised Florida Products Exemption violates the federal Constitution by involving Florida in foreign affairs. Under the Supreme Court's decisions, this Court must declare the Florida statutes unconstitutional if the statutes *either* implicate Florida in foreign affairs *or* directly conflict with federal law. *See Springfield Rare Coin Galleries v. Johnson*, 503 N.E.2d 300 (Ill. 1986).

With respect to the first basis for a finding of unconstitutionality, Appellants argue that the Florida statutes do not implicate Florida in foreign affairs because the statutes do not require a judging of foreign countries' policies. Todhunter and Jacquin assert that "the Florida statutes do not attempt to change any nation's policies." (Todhunter and Jacquin's Reply at 16.) In fact, the Florida statutes specifically sanction any foreign country with suspect economic policies by discriminating against the country's exports. §§ 564.09 and 565.12, Fla. Stat. (1985). The State, in these very proceedings, has represented that the Florida tax statutes permit Florida to make determinations about foreign countries' economic policies in order to "discourage the implementation or continuance of purely local favoritism in other jurisdictions." (A. 565.)

The Illinois Supreme Court's analysis in *Springfield Rare Coin Galleries v. Johnson*, 503 N.E.2d 300 (Ill.1986), provides a paradigm for this case.[2] The Illinois Court, applying *Bacchus*, determined that a payer of an Illinois tax had standing to challenge its constitutionality under the foreign affairs doctrine. The Court proceeded to find unconstitutional an Illinois tax, which granted tax exemptions on currency dealers' sales of currency of all countries but South Africa, as an intrusion into the federal government's exclusive power over

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[2] *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), does not speak to this case. *Container Corp.*, which concerns a state's latitude in apportionment of corporations' foreign and domestic income, does not provide a constitutional rule for reviewing a state's attempt to discriminate against foreign countries' exports.

foreign affairs. "[D]isapproval of the political and social policies of a foreign nation," the Court opined, "does not provide a valid basis for a tax classification by this State." *Id.* at 307.

With respect to the second basis for a finding of unconstitutionality, Appellants argue that the Florida statutes do not interfere with federal laws and executive agreements.[3] The State, which claims that the statues do not discriminate against foreign goods, finds no conflict between the state statutes and federal law. In fact, McKesson's analysis of the Caribbean Basin Economic Recovery Act provides only one example of a conflict. Under CBERA, the United States offers trade advantages to Caribbean nations in order to encourage "one-way free trade." H. Rep. No. 98-266, 98th Cong., 1st sess., at 3 (reprinted in 1983 U.S. Code Cong. & Admin. News at 643, 644). The United States hopes to promote political and economic stability in the Caribbean by encouraging its nations to export their products to the United States. H. Rep. No. 98266, 98th Cong. 1st sess., at 3 (1983) (reprinted at 1983 U.S. Code Cong. & Admin. News 643, 644).

The revised Florida Products Exemption, which promotes Florida products at the expense of the Caribbean's products, obviously undercuts CBERA. At the same time the United States has *decreased* the price of Caribbean rum through an exemption from customs duties, the Florida statutes through the Take Back Provisions have *increased* the price. Florida's efforts to favor Florida producers at the expense of foreign producers directly collides with the United States' efforts, through CBERA and other acts, to grant some foreign nations, such as the Caribbean nations, certain international trade advantages.

Appellants claim that as long as McKesson cannot identify a country whose exports cannot qualify for Florida's preferences, a

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[3] The State's comments about GATT are a puzzle. McKesson's Answer noted that McKesson's standing to raise an argument under GATT does not depend upon GATT's being a treaty. GATT, as an executive agreement, supercedes Florida law by virtue of the Supremacy Clause. U.S. Const., art. VI, cl. 2. *See United States v. Belmont*, 301 U.S. 324, 331-32 (1937). State statutes that contravene GATT by placing restrictions on the sale of foreign imports are unconstitutional. *E.g., Territory v. Ho*, 41 Haw. 565, 567-71 (1955).

ruling on constitutionality would be premature. In fact, in the Circuit Court, McKesson specifically identified a Caribbean nation, Barbados, and Mt. Gay Rum, its export, as victims of Florida's interference in foreign affairs. (A. 367-68.) Barbados has designated its sugar and rum industries, as a "basic industries," has provided the industries a special capital investment allowance twice as large as many other industries, and has authorized rebates on taxes payable on profits for exports to the United States. *See* Barbados Income Tax Act of 1982, Div. H, § 12, and Regulations, Part IV, § 7; Price Waterhouse, *Corporate Taxes: A Worldwide Summary* at 18-22 (1986); Diamond, *Foreign Tax and Trade Briefs*, §§ 4.5-20 (1985). If Barbados' economic benefits for its sugar and rum industries do not equal, in the Take Back Provisions' words, "economic incentives or advantages" or "export subsidies," the Take Back Provisions are meaningless. The State cannot constitutionally force McKesson to litigate in an administrative proceeding what any Florida court may judicially notice. Fla. Evid. Code § 90.202(4) (1986) (judicial notice of foreign laws). The convening of an administrative proceeding would result in an unconstitutional investigation of foreign affairs. *See Zschernig v. Miller*, 389 U.S. 429, 88 S.C.t.[sic] 664, 19 L.Ed.2d 683 (1968).[4]

II. THE REVISED FLORIDA PRODUCTS EXEMPTION VIOLATES THE UNITED STATES CONSTITUTION'S IMPORT-EXPORT CLAUSE.

McKesson maintains that the Revised Florida Products Exemption conflicts with the Import-Export Clause's prohibition on any discriminatory state tax on imported goods. The Revised Florida Products Exemption, through its Take Back Provisions, unconstitutionally permits Florida to deny tax exemptions to foreign

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[4] Appellants' suggestion that the Twenty-first Amendment, which allows Florida to regulate the consumption of alcoholic beverages within the state, permits discrimination against foreign imports is frivolous. The Supreme Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), concluded that the Amendment does not save a discriminatory tax scheme: the "central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *See also Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. __, 106 S.Ct. 2080, 90 L.Ed.2d 552, 563-64 (1986).

alcoholic beverages solely on the basis of the beverage's country of origin. *See Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276, 28., 96 S.Ct. 535, 46 L.Ed.2d 495 (1976).

Specifically, the Florida statutes' Take Back Provisions expressly empower Florida courts and officials to examine the agricultural and trade policies of foreign governments in light of the Provisions' restrictions. This statutory examination presupposes calculated discrimination against specific countries. In effect, Florida's statutes require Florida to impose different taxes on the products of different countries solely on the basis of the place of origin.

The Import-Export Clause does not permit the Revised Florida Products Exemption's approach to taxation. In *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976), the Supreme Court made clear that a state tax may not constitutionally "fall on imports as such because of their place of origin." *Id.* at 286 Although the Import-Export clause does not accord imported goods preferential treatment, it "clearly prohibits state taxation based on the foreign origin of the imported goods " *Id.* at 287 *See also Department of Revenue v. James-B. Beam Distilling Co.*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964); *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla. 1984).

Appellants argue that the Revised Florida Products Exemption does not tax foreign alcohol on the basis of place of origin. (State's Brief at 29; Jacquin's Brief at 5; Todhunter's Brief at 11.) Jacquin and Todhunter, who profit from the Florida statutes' discrimination against foreign goods, predicate their argument on the assertion that "only if the product has already received a benefit" will the product face higher Florida taxes. (Jacquin and Todhunter's Reply at 14.)

In fact, the Revised Florida Products Exemption requires the Florida Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, to make determinations on the basis of the policies of individual countries and not on the basis of a particular manufacturer's economics. A country which "discriminates" against foreign alcoholic goods, which provides "economic incentives or

advantages" for its own goods, or which provides "export subsidies" for its own agricultural products will lose the benefits of Florida's preferences and exemptions for *all* its products and not merely for the beneficiaries of the particular policies. As a result, a manufacturer, whose country pursues policies which Florida disfavors, will not qualify for an exemption even thought the manufacturer receives absolutely no benefit from the country's policies. *See* §§ 564.06(9) and 565.12(1) (c) and (2) (c).

In its Reply, the State apparently concedes that the Revised Florida Products Exemption will permit Florida to establish different tax rates for different countries. (State's Reply at 23-27.) The State suggests that this Court permit the State to rewrite the Florida statutes through administrative regulations so that the Take Back Provisions do not operate on the basis of place of origin. (State's Reply at 24.) In other words, the State, which contends that the Florida statutes do not require investigations into other countries' internal affairs, would permit the Division not only to determine foreign countries' policies but also to gauge their impact on particular foreign nationals. Constitutional protections for commerce "cannot be made to depend on the good grace of the state agency." *Brown Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. __, 106 S.Ct. 2080, 2086 n.5 (1986). The Florida statutes, of course, provide no guidance for such agency determinations.

Either as written by the legislature or as rewritten by the State, the Florida statutes grant far too much latitude to the State to discriminate against foreign products on the basis of place of origin. The State's inquiry would deny some foreign products an exemption solely because specific countries have adopted certain policies. The Import-Export Clause does not allow Florida to implement statutory schemes that result in tax discrimination on the basis of place of origin. *Michelin Tire Corp. v. Wages Tax Commissioner*, 423 U.S. 276 (1976); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

III. McKESSON IS ENTITLED TO A REFUND OF THE UNCONSTITUTIONAL TAXES.

McKesson has established that Florida has imposed discriminatory taxes on McKesson's products under the Revised Florida Products Exemption in violation of the United States Constitution. Under Florida law, as well as federal law, the remedy for McKesson's constitutional injury is a refund.

A. Florida's Tax Statutes Mandate McKesson's Receiving a Refund.

The State's discussion of McKesson's right to a refund under the Florida tax statues mysteriously fails to discuss Florida's statutory scheme.

Florida has determined by statue who shall bear the burden of the alcoholic beverage tax. The Revised Florida Products Exemption specifically imposes the burden of the tax on "manufacturers and distributors." §§ 564.06(1), (3), and (4), and 565.12(1) and (2), Fla. Stat. (1985).

Florida also has determined by statue who shall receive a tax refund under the alcoholic beverage tax statutes. McKesson seeks its tax refund under section 215.26, Florida Statutes (1985). Section 215.26 provides that the comptroller shall pay the tax refund to the person who paid the tax. McKesson, as a distributor of alcoholic beverages at wholesale, has in fact paid the excise taxes on its alcoholic beverages under the discriminatory tax statutes. (A. 365-66.) Therefore, McKesson is entitled to the refund.

Florida's statutory scheme represents the Florida legislature's decision concerning who must pay taxes and who may receive a tax refund. The Florida legislature demonstrably knows how to construct a pass-on tax. For example, Florida's motor fuel tax, section 212.62 (2)(a), Florida Statutes (Supp. 1987), expressly provides that "[t]his levy of tax is upon the ultimate retail consumer." The dealer, as a matter of "administrative convenience," acts as agent for the state in

collecting the tax. *See also* § 212.07, Fla. Stat. (Supp. 1987) (sales tax). The Florida legislature's statutes for alcoholic beverage taxation, in contrast, do not create a pass-on scheme.

Although the State invites this Court to rewrite Florida's tax statutes so that the State may preserve its unconstitutional taxes on McKesson from a statutory refund, this Court must decline the invitation as it has in similar cases.

For example, in *State ex rel. C.P.O. Mess (Open) v. Green*, 174 So.2d 546 (Fla. 1965), addressing another alcoholic beverage tax statute, this Court construed identical statutory language as imposing a tax directly on the manufacturer or distributor and not on the ultimate consumer. In *Green*, several military entities successfully sought a refund of certain alcoholic beverage excise taxes on federal constitutional grounds. The Court noted that the amended statute formerly provided that "there shall be paid by all manufacturers and distributors" a particular tax. *Id.* at 548. The same language is found in sections 564.06 and 565.12, Florida Statutes (1985). *See* §§ 564.06(1), (3), and (4), and 565.12(1) and (2). The Court found that the cited language "was clearly a tax to be paid by the manufacturers or distributors -- *not the purchasers or consumers*. 174 So.2d at 549 (emphasis in the original). *See also Dade County v. Atlantic Liquor Co., Inc.*, 245 So.2d 229 (Fla. 1970) (alcoholic beverage excise tax statute imposed the tax burden upon manufacturers and distributors, not upon the ultimate purchaser).

This Court has required specificity from the legislature for the creation of a pass-on tax. In *United States v. Lee*, 153 Fla. 94, 13 So.2d 919, 921-22 (1943), the Court held that a gasoline tax statute imposed the tax upon the dealer rather than the consumer, even though language in the statue indicated that the consumer ultimately paid the tax. Although "the consumer ultimately pays the tax" by allowing dealer a "sufficient margin" for the dealer's overhead, the tax "does not amount to a tax on the consumer." *Id.* at 921.[5]

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[5] The United State Supreme Court and other federal courts have also rejected as irrelevant and impracticable the State's theories concerning pass-on in analogous cases. *See, e.g., Armco, Inc. v. Hardesty*, 467 U.S. 638,

B. Florida Law Requires McKesson's Receiving Retrospective Relief.

The State also ignores Florida law in discussing McKesson's entitlement to retrospective relief. Over the past 15 years, in resolving challenges to various Florida tax schemes, this Court consistently has held that those taxpayers who actually file the challenges are entitled to the statutory tax refunds, even if non-litigants do not receive any retrospective relief. *See City of Tampa v. Birdsong Motors , Inc.*, 261 So.2d 1, 7 (Fla. 1972), *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So.2d 993, 995 (Fla. 1976), *Osterndorf v. Turner*, 426 So.2d 539, 541, 545 (Fla. 1982), *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984), and *Colding v. Herzog*, 467 So.2d 980, 982 (Fla. 1985).

The State cites a Florida decision and a North Dakota decision to support its argument for denying McKesson a remedy for its constitutional injury. Both cases, *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973), and *Metropolitan Life Ins. Co. v. Commissioner of Dept. of Ins.*, 373 N.W.2d 399 (N.D. 1985), denied retroactive relief because, among other reasons, the taxing authority in each case properly assumed the constitutionality of the tax statute. The State cannot make that argument in this case.

The State erroneously asserts that *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), established a new principle of law, and that Florida, therefore, justifiably relied on prior constitutional law in administering its alcoholic beverage tax statutes.[6] The State apparently

644-45, 645 n.8, 104 S. Ct. 2620, 81 L.Ed.2d 540 (1984); *Gurley v. Rhoden*, 421 U.S. 200, 204-06, 211, 95 S.Ct. 1605, 44 L.Ed.2d 110 (1975); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493-94 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968); *Nat'l Meat Ass'n v. Deukmejian*, 743 F.2d 656, 661-62 (9th Cir. 1984), *aff'd*, 469 U.S. 1100, 105 S. Ct. 768, 83 L.Ed.2d 766 (1985).

[6] Only the minority in *Bacchus* believed that the majority established new law. *Bacchus*, of course, applied firmly established Commerce Clause doctrine. *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977).

hopes this Court will forget that the Florida legislature enacted the Revised Florida Products Exemption *after* the *Bacchus* decision. Further, in revising the former Florida Products Exemption, the legislature promptly acted not to eliminate the protectionism in the old scheme but rather to preserve the old protectionism in new language.[7]

To preserve unconstitutional protectionism, the legislature enacted the tax statutes after *Bacchus* and *Delta Air Lines*, as well as numerous other Commerce Clause cases, plainly circumscribed the State's latitude in promoting its own industry. The State's inaccurate history of the Florida legislature's errors does not support this Court's reversing its own precedent to allow the State to retain the benefits of its unconstitutional tax scheme.[8]

C. This Court's Severance of the Unconstitutional Tax Provisions Will Not Remedy McKesson's Constitutional Injury.

Finally, the State argues that this Court's severing the unconstitutional tax preferences will cure the constitutional injury and therefore negate McKesson's claim for a refund. The State, however, ignores a fundamental distinction.

If the State merely argued that this Court's prospective severance of the discriminatory provisions, eliminating preferences and

[7] McKesson, in its Answer, cited this Court to the statements of the revised law's legislative sponsors, articulating the law's protectionist purpose. Appellants, in response, cite the statements of the Secretary of the Florida Department of Business Regulation, who wrote two memoranda to the Governor's office warning that the revised Exemption was unconstitutional, and the statements of a lobbyist representing Florida liquor distillers. (Compare Jacquin and Todhunder's Reply Brief at 8-9 and A. 479-85.)

[8] The State also cites *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973). In *Lemon*, the Supreme Court, unlike this Court, neither considered a taxpayer's claim for relief from a discriminatory tax burden, nor addressed a statute mandating a tax refund as the remedy for the discrimination.

exemptions, would eliminate any *prospective* injury to McKesson or any other distributor, McKesson would agree. *See Delta Air Lines, Inc. v. Dept. of Revenue*, 455 So.2d 317, 321 (Fla. 1984). Obviously, when the favoritism for parochial products ends, the unconstitutional discrimination also ceases.

However, if the State means to argue that this Court's prospective severance of the discriminatory provisions will eliminate the injury to McKesson that the discriminatory taxes have already caused, the State fundamentally misunderstands the doctrine of severance. *See Westinghouse Electric Corp. v. Tully*, 470 N.E. 2d 853, 854, 856-57 (N.Y. 1984). In *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247, 52 S.Ct. 133, 76 L.Ed. 265 (1931), a constitutional challenge to discriminatory taxation, the United States Supreme Court stated:

> The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that the taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

The Florida legislature has not decided to "retroactively sever" the Florida statutes' discriminatory tax preferences and exemptions and impose a retroactive tax burden, without the preferences and exemptions, upon the favored manufacturers and distributors. The State does not propose retroactive severance, and the intervenors understandably do not mention it.

Accordingly, McKesson's only remedy under Florida law for its constitutional injury is an appropriate tax refund.

CONCLUSION

McKesson respectfully asks the Court to end Florida's violation of the federal Constitution's proscriptions by, first, affirming the Circuit Court's declaration of unconstitutionality and, second, directing the Circuit Court to award McKesson a tax refund of the difference between what McKesson paid in taxes and what McKesson would have paid if its products had received the same treatment as the favored products.

Dated: May 28, 1987.

Respectfully submitted,

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SUPREME COURT OF FLORIDA

NO. 70,368

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA, ET AL., Appellants/Cross-Appellees,

vs.

MCKESSON CORPORATION, ET. AL., Appellees/Cross-Appellants.

[February 18, 1988]

EHRLICH, J.

On June 29, 1984, the United States Supreme Court decided the case of *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984). In *Bacchus*, the Court struck down a Hawaii alcoholic beverage excise tax which exempted okolehao, a brandy distilled from the root of an indigenous shrub of Hawaii, and fruit wine manufactured in the state as being violative of the Commerce Clause, concluding that the exemption had both the purpose and effect of discriminating in favor of locally produced products. At the time of the *Bacchus* decision, sections 564.06 and 565.12, Florida Statutes (Supp. 1984), granted tax preferred treatment to alcoholic beverages made from certain base agricultural crops grown in Florida and manufactured and bottled in Florida. In response to the *Bacchus* decision, the Florida Legislature amended sections 564.06 and 565.12 in Chapters 85-203 and 85-204, Laws of Florida. The amended provisions, as codified in sections 564.06 and 565.12 Florida Statutes (1985), among other things, grant exemptions or tax preferences to wines and distilled spirits manufactured from citrus, sugar cane and certain grape species, all of which will grow in Florida, or from by-products or concentrates

thereof, no matter where the point of manufacture and disallow the tax preference to eligible alcoholic beverages under certain circumstances.

Three separate complaints were filed against the Division of Alcoholic Beverages and Tobacco (DABT) challenging the revised tax preference scheme: one by Tampa Crown Distributors, Inc. and Florida Beverage Corporation, licensed wholesale distributors of alcoholic beverages in Florida, one by McKesson Corporation, also a licensed wholesale distributor and the third by Brown-Forman Corporation, a manufacturer of wine coolers in California who sells its products to wholesalers in Florida for resale in the state. Tampa Crown, Florida Beverage and McKesson challenge the preference and disqualification provisions of both sections 564.06 and 565.12. Brown-Forman challenges only those of section 564.06. The primary claim in all three complaints was that the preference and disqualification provisions under the new tax scheme discriminated in favor of local commerce and against interstate commerce contrary to the mandates of *Bacchus* .

Jacquin-Florida Distilling and Todhunter International, manufacturers who benefit from the challenged preference scheme, intervened as defendants. The DABT raised a number of defenses to each complaint, including a claim that each plaintiff lacked standing to challenge the provisions in question. Tampa Crown/Florida Beverage and Brown-Forman filed motions for summary judgment and supporting affidavits. McKesson filed a motion for partial summary judgment and preliminary injunction. The trial court entered final summary judgments in favor of Tampa Crown/Florida Beverage and Brown-Forman and entered a partial summary judgment and preliminary injunction in favor of McKesson. In all three judgments, the trial judge found:

> These amendments were an effort by the legislature to overcome the constitutional problems in the Florida Alcoholic Beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

The rulings were prospective in nature.

The DABT appealed those portions of the judgments finding the tax preference scheme unconstitutional. McKesson and Tampa Crown filed cross-appeals challenging the prospective nature of the rulings and the denial of their claims for a refund. The District Court consolidated the cases and certified the cause to this Court as involving a question of great public importance requiring immediate resolution. We have jurisdiction, article V, section 3(b)(5), Florida Constitutions, and affirm.

First we address the DABT's claim that the appellees lack standing to challenge the "disqualification provisions" because none of them have "alleged or proved any harm to their business flowing from those provisions." Each of the appellees claims that the *overall* tax preference scheme for alcoholic beverages, which is made up of both the exemption provisions and the disqualification provision of sections 564.06 and 565.12, discriminates against interstate commerce and thus, has an adverse competitive impact on their businesses. It is clear, under the *Bacchus* decision, that, as wholesale distributors and manufacturers of alcoholic beverages who are liable for taxes under Florida's alcoholic beverage tax scheme, the appellees have standing to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact on their businesses. 104 S.Ct. at 3053; *see also Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d. 311, 317 (Fla. 1984). Further, we agree that the appellees clearly have standing to assert their constitutional right to engage in interstate commerce free of burdens violative of the commerce clause. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977); *Mapco Inc. v. Grunder*, 470 F. Supp. 401, 405 (N.D. Ohio 1979).

COMMERCE CLAUSE

We next address the merits of the appellees' challenge under the Commerce Clause of the United States Constitution. The United States Supreme Court employs a two-tiered approach to analyzing state

economic regulation under the Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S.Ct. 2080 (1986). This approach was recently explained by the Court in *Brown-Forman* as follows:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed. 2d 475 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925); *Edgar v. MITE Corp.*, 457 U.S. 624, 640-43, 102 S.Ct. 2629, 2639-41, 73 L.Ed. 2d 269 (1982) (plurality opinion). When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d. 174 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. *See Raymond Motor Transportation, Inc., v. Rice*, 434 U.S. 429, 440-441, 98 S.Ct. 787, 793-94, 54 L.Ed.2d. 664 (1978).

106 S.Ct. at 2084-85.

That DABT argues that because any effect which the challenged tax preference scheme might have on interstate commerce is indirect and the tax is applied evenhandedly, the *Pike* balancing approach must be employed in this case. The DABT maintains that under that approach, the trial court erred in finding the challenged tax scheme violative of the Commerce Clause. The appellees, on the other hand, take the position that because the challenged provisions have both the purpose

and effect of discriminating against interstate commerce, they were properly struck down by the trial court as "simple economic protectionism." They argue in the alternative that the preference scheme cannot withstand scrutiny under the *Pike* balancing test. After reviewing the challenged provisions, in light of the record in this case, we agree with the appellees that, even under the *Pike* balancing test, summary judgment was properly entered in their favor.[1]

Section 564.06, Florida Statutes (1985) provides in pertinent part:

Excise taxes on wines and beverages; exemptions. -

> (1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of $2.25 per gallon.
>
> (2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana, or Vitis berlandieri*, or from concentrates thereof, except for flavorings extracts, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcoholic content is manufactured exclusively from citrus fruits, varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana or Vitis berlandierei* (sic), citrus products, citrus byproducts, sugarcane, sugarcane byproducts, or from concentrates

[1] We find no merit to the DABT's claim that the trial court entered the summary judgments prematurely, thereby failing to allow the Department an adequate discovery period.

> thereof, except for flavoring extracts, the tax imposed by subsection (1) shall not apply.
>
> (3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of $3 per gallon, except that this tax shall not be required to be paid upon all wines of which the alcohol content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana, or Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts and containing 14 percent or more of alcohol by weight.
>
> (4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $3.50 per gallon, except that this tax shall not be required to be paid upon all natural sparkling wines of which the alcoholic contents is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana, or Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts.
>
> • • •
>
> (7) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.
>
> • • •
>
> (9) The exemptions from payment of taxes provided in subsections (2), (3), and (4) or the tax rates set forth in subsection (10) shall not apply:

(a) To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

(b) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

(c) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural produces (sic) used in making said alcoholic beverages.

Funding for research purposes or retail sale of wine at licensed wineries shall not be construed as an 'economic incentive or advantage' within the meaning of this subsection.

Section 565.12, Florida Statutes (1985), provides in pertinent part:

Excise tax on liquors and beverages. -

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $6.50 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.35 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(2)(a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $9.53 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.95 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural produces (sic) used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

The appellees maintain that a review of the legislative history of the tax scheme at issue will "reveal the legislature's transparent intent to use the Revised Florida Products Exemption to effect economic protectionism." They argue that the exemption scheme was devised "to protect certain Florida agricultural products, and to protect the manufacturers using those products" at the expense of out-of-state products and the manufacturers using those products and that such a discriminatory purpose requires that the tax preference be found a per se violation of the commerce clause under *Bacchus*. Because we find that the tax scheme at issue places a clear discriminatory burden on interstate commerce which the state has failed to justify in terms of legitimate local benefits other than the admitted benefits to local industry flowing from the statute, we need not determine whether the challenged provisions were in fact enacted to serve some underlying protectionist purpose. *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 (1977).

The DABT bases its position that the tax scheme at issue is evenhanded in its application on the fact that an exemption or

preference is granted based on the classification of crop from which an alcoholic beverage is made rather than upon the in-state origin of the beverage. Affidavits from several experts establish that 1) citrus and sugarcane are grown in Florida as well as in other areas of the United States and the world and 2) the specified grape species are grown throughout the Southeastern United States and the Atlantic States Regions. The DABT acknowledges that "[w]ithout question, [the] provisions [at issue] may affect commerce by increasing the use of sugarcane and citrus in the manufacture of beverages," but maintains that "the effect is not a violation of the Commerce Clause." It contends that no "undue burden on interstate commerce" results from "the fact that some crops used in the interstate production of alcohol may be displaced by other crops grown and sold in the interstate market" or from the fact that there may be "a temporary displacement due to market adjustment." For this proposition, the DABT relies on decisions of the United Supreme Court in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and the Colorado Supreme Court in *Archer Daniels Midland Co. v. State*, 690 P.2d 177 (Colo. 1984). We find the Exxon decision clearly distinguishable from the situation before us and question whether *Exxon* was properly applied by the Colorado Court in *Archer Daniels*.

In *Exxon*, the Supreme Court upheld a Maryland statute prohibiting producers and refiners of petroleum products --all of which were out-of-state businesses-- from retailing gasoline in the state. The statute was enacted in response to perceived inequities in the allocation of petroleum products to retail outlets during the fuel shortage of 1973. In challenging the statute, various oil companies, all of which were engaged in production and refining, as well as in the retail sale of petroleum products, argued that the statute violated the Commerce Clause by discriminating against producers and refiners, all of which were interstate businesses, in favor of independent retailers, most of which were local businesses. In rejecting this contention the Court first found that the statute served the legitimate state purpose of "controlling the gasoline retail market". 437 U.S. at 125. The Court went on to reject claims of discrimination at both the producing-refining and retailing ends of the petroleum industry. The Court concluded that the statute could not discriminate against interstate

petroleum producers and refiners in favor of locally based competition because there were no locally based producers and refiners. The claim of discrimination at the retail level was also rejected because the statute placed "no barriers whatsoever" on competition in local markets by interstate independent dealers. The Court found the situation presented in *Exxon* distinguishable from cases such as *Hunt* and *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), in which a state has been found to have discriminated against interstate commerce, because the statute in *Exxon* was found "not [to] prohibit the flow of interstate good, [to] place added costs upon them, or [to] distinguish between in-state and out-of-state companies in the retail market." 437 U.S. at 126. The Court held that neither the "fact that the burden of a state regulation falls on some interstate companies" nor the fact that "an otherwise valid regulation causes some business to shift from one interstate supplier to another" was enough, under the circumstances, to establish a Commerce Clause violation. 437 U.S. at 126-27. However, the Court noted in footnote 16 of the opinion that:

> If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market -- as in *Hunt*, 432 U.S., at 347, [97 S.Ct., at 2443] and *Dean Milk*, 340 U.S., at 354, [71 S.Ct. at 297]-- the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in Maryland and, indeed, no demonstrable effect whatsoever on the interstate flow of goods.

437 U.S. at 126 n. 16. The Maryland statute had no effect whatsoever on the interstate flow of goods because, regardless of the status of the ultimate retailer, all the petroleum products sold within the state came from out-of-state.

The DABT also relies heavily on the Colorado Supreme Court's decision in *Archer Daniels*. The *Archer Daniels* court upheld a Colorado statute which provided for a sales tax reduction on gasohol containing at least ten percent alcohol derived from agricultural and

forest products and limited the reduction to gasohol "produced from no more than three million gallons of alcohol annually from each facility having a design production capacity of seventeen million gallons or less per year." 690 P.2d at 180. As originally enacted, the challenged statute limited the tax break so gasohol made from Colorado-produced alcohol. The statute was challenged as violative of both the Commerce and Equal Protection Clauses of the United States Constitution. The Commerce Clause challenge was based on the fact that no Colorado fuel-alcohol producer had facilities which were large enough to be affected by the production capacity limitation; whereas, several out-of-state producers, including the plaintiff, had facilities with a production capacity of more than seventeen million gallons a year. Relying on the *Exxon* decision, the court concluded that the capacity limitations did not have the effect of discriminating against interstate commerce.

In *Exxon*, the lack of a competitive advantage of in-state independent dealers over out-of-state independent dealers and the fact that the Maryland regulation at issue had no effect whatsoever on the interstate flow of goods were critical factors. Along with these factors, it appears that both the *Archer Daniels* court and the appellants, sub judice, have overlooked what the United States Supreme court (sic) has recognized as the "most critical factor in *Exxon*," the absence of discrimination between interstate and local producer-refiners because there were no local producer-refiners to be favored. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 42 (1980). In contrast, in the instant case, there are clearly manufacturers and distributors of alcoholic beverages made from local products who receive a competitive advantage from the challenged provision. We find this distinction to be crucial and agree with the appellees that the challenged tax preference scheme places a burden on interstate commerce similar to that found to be present in the *Hunt* case.

In *Hunt*, the Washington State Apple Advertising Commission challenged as violative of the Commerce Clause a North Carolina statute which prohibited the display of state grades on closed containers of apples sold or shipped into the state. The Court held this facially neutral law had "the practical effect of not only burdening

interstate sales of Washington apples, but also discriminating against them." 432 U.S. at 350. This conclusion was based on the fact that the challenged statute not only raised the cost of doing business for out-of-state dealers, thus, shielding the local apple industry from the competition of Washington apple growers, but also had the effect of "stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system." 432 at 351. Finding no local benefits flowing from the statute which outweighed the discriminatory burden on interstate commerce and that nondiscriminatory alternatives were available, the *Hunt* Court held that the North Carolina statute violated the commerce clause.

The *Hunt* decision also illustrates that the mere fact that not all out-of-state competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce. *See also, Mapco, Inc. v. Grunder*, 470 F. Supp. 401. In *Hunt*, prior to the challenged statute's enactment, thirteen states shipped apples into North Carolina for sale. Seven of those states, including Washington, had their own grading systems and thus, were disadvantaged by the statute. 432 U.S. at 349. Despite the fact that the six states which did not have a grading system likely benefited from the same "leveling effect which insidiously operate[d] to the advantage of local apple producers," 432 U.S. at 351, the North Carolina statute was found to place a discriminatory burden in interstate commerce.

After considering the probable effect of the challenged tax scheme on both local and interstate commerce, we perceive the same type of discriminatory burden which was recognized in *Hunt*. It is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not. It is also undisputed that the beverages targeted for preferential treatment are those manufactured from specified crops, all of which will grow in Florida. It is likewise undisputed that alcoholic beverages made from citrus, sugarcane and the grape species designated in section 564.06 are regarded by consumers as less desirable than alcoholic beverages

manufactured from *vinifera* grapes (which cannot be grown in commercial quantities in Florida) and other agricultural bases. With these facts in mind it becomes quite apparent that, just as the North Carolina statute which was struck down in *Hunt*, Florida's alcoholic beverage tax scheme clearly raises the relative cost of doing business for a manufacturer or distributor of alcoholic beverages which are not made from base crops which are "adapted to growing in Florida". And further, by increasing the cost of beverages made from non-designated crops such as *vinifera* grapes and grains relative to beverages made from the designated preferred crops, the challenged tax preference scheme strips away from manufacturers and distributors of those beverages the competitive and economic advantages which naturally flow from marketing beverages which are considered superior by the public. When such a burden on interstate commerce is demonstrated, "the burden falls on the state to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353. *See also, Minnesota v. Clover leaf* (sic)*Creamery Co.*, 449 U.S. 456 (1981).

The DABT and intervenors, Jacquin and Todhunter, contend that even if the challenged tax preference scheme is found to burden interstate commerce, it must be upheld because it was enacted to further Florida's legitimate state interest in promoting the use of important Florida agricultural crops and the beverages made from those crops. As stated by the DABT, the preference provisions further the "legitimate state interest" of "enhancing the flagging receptivity of consumers to alcoholic beverage products made from crops which Florida is adapted to growing." The DABT maintains that its position that a state's interest in promoting its own products is "legitimate" for commerce clause purposes is supported by the Supreme Court's recognition that "a state may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271; *see also Boston Stock Exchange*, 429 U.S. 318, 336 (1977) (States may structure their tax systems "to encourage the growth and development of intrastate commerce and industry.")

We agree with appellees that the stated purpose of promoting use of Florida products will not justify a discriminatory burden on interstate commerce such as that present in this case. The appellants' argument that any burden on interstate commerce is outweighed by the state's interest in promoting alcoholic beverages "made from crops which Florida is adapted to growing" is at odds with the "general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44. As the United States Supreme Court has recently noted in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985):

> [I]n Bacchus, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry," we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business.

470 U.S. at 876 n.6. (citations omitted)[2]

Not only have the appellants failed to show that a legitimate state concern is being served by the challenged provisions, they have also failed to show the stated local interest could not be promoted as well by alternative means which would have "a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. Indeed, as pointed out by appellee McKesson, several such alternatives have received express judicial approval under the Commerce Clause. For example, the legislature could have provided property tax relief to Florida manufacturers or growers, as was approved in *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 864 (S.D.N.Y. 1985). Other less discriminatory alternatives include direct cash subsidies, state-sponsored research, or

[2] We also note that promotion of domestic business or industry, when accomplished by imposing a discriminatory tax against out-of-state competitors, is not a legitimate state purpose under the Equal Protection Clause of the United States Constitution. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 882 (1985).

state-sponsored promotional campaigns for alcoholic beverages made from Florida crops. *See Id.*

We cannot agree with appellant Jacquin's contention that Florida's alcoholic beverage tax scheme is entitled to "great deference because of the Twenty-first Amendment grant to the individual states of extraordinary powers to regulate alcoholic beverages." As noted in *Bacchus*, 468 U.S. at 276, and recently reiterated in *Brown-Forman Distillers v. N.Y. State Liquor Authority*, 106 S.Ct. at 2087, a state statute is entitled to such defence only when it is determined that the challenged law was enacted to carry out a "purpose of the Twenty-first Amendment." No clear concern of the twenty-first amendment has been shown to be furthered by this tax preference scheme which places an otherwise unjustified and therefore excessive burden on interstate commerce.

We also agree with the appellees that even if the overall preference scheme did not violate the commerce clause by placing an excessive burden on interstate commerce, sections 564.06(9)(a) and 565.12(1)(c)l., (2)(c)1. which deny the tax preference to "alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries" can not stand. A state may not enact discriminatory legislation in "response to another State's unreasonable burden on commerce." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958 n.18 (1982); *See also Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986) (State may not enact discriminatory legislation designed to coerce another state into desisting from a Commerce Clause violation). The Commerce Clause itself provides the remedy for discriminatory taxes or requirements placed on out-of-state products. *See Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976).

Because we find the challenged tax preference scheme violative of the Commerce Clause and affirm the summary judgment on that basis, we need not address the other challenges raised by the appellees.

TAX REFUND

We next consider whether the trial court erred in giving its ruling prospective effect and thereby denying cross-appellants McKesson and Tampa Crown a refund. McKesson argues that only a refund of the difference between the disfavored product's tax rate and the favored product's tax rate will cure the constitutional injury which it has suffered. It maintains that because it has paid the discriminatory taxes under protest, pursuant to section 215.26, Florida Statutes (1985), it is entitled to a refund under both state and federal law. Cross-appellant Tampa Crown makes a similar argument. We agree with the DABT that the prospective nature of the rulings below was proper in light of the equitable considerations present in this case. *See Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973); *Lemon v. Kurtzman*, 411 U.S. 192 (1973). Not only was the tax preference scheme implemented by the DABT in good faith reliance on a presumptively valid statute, as pointed out by the DABT, if given a refund, cross-appellants would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers.

Accordingly, both those portions of the judgments below finding

> [t]hat the provisions of [Florida Statutes] 564.06(2), (3) following the term "$3.00 per gallon," (4) following the term "3.50 (sic) per gallon," (7) and (9) through (13) and [Florida Statutes] 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) are . . .unconstitutional on their face,

and those portions giving the rulings prospective effect are affirmed.

It is so ordered

McDONALD, C.J., AND OVERTON, SHAW, BARKETT, GRIMES AND KOGAN, J.J.,

Concur

(District certification and list of counsel omitted in printing)

SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 70,368

(Caption omitted in printing)

APPELLEE AND CROSS-APPELLANT
McKESSON CORPORATION'S MOTION FOR REHEARING

Appellee-Cross-Appellant McKesson Corporation ("McKesson"), by and through its undersigned attorneys, pursuant to Florida Rule of Appellate Procedure 9.330, moves for rehearing. McKesson does not wish to reargue the merits of its case but respectfully believes that the Court has overlooked or misapprehended certains [sic] points of law and fact in its peremptory denial of any relief for the constitutional injury McKesson has sustained during the period that Florida has collected discriminatory taxes. McKesson submits that the Court's decision denying relief overlooks both federal law established in similar cases and this Court's own decisions.[1]

The Court in denying McKesson's request for an appropriate refund appears to expand the holding in *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973), such that a heretofore-

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[1] McKesson will not restate the federal constitutional law arguments that it has already made to this Court. The Court, however, cites *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), in denying McKesson relief. The United States Supreme Court has not in this century permitted a state to collect or retain taxes assessed under an unconstitutional statute. *Lemon* does not hold otherwise. The Court in *Lemon* did not address a taxpayer's claim for relief from a discriminatory tax burden. Rather, the Court allowed payment pursuant to service contracts for services already rendered, even though the Court earlier had declared the contracts unconstitutional. *Lemon* simply cannot be used to authorize Florida to retain taxes that this Court has held were unconstitutionally collected.

recognized narrow exception to the doctrine has swallowed the doctrine.[2] This Court consistently has provided a refund remedy to taxpayers who paid taxes under an unlawful scheme, although the Court has limited that remedy to those taxpayers who actually filed the suit challenging the validity of the tax scheme.[3] In *Gulesian*, however, the Court allowed a carefully-reasoned exception.

In *Gulesian*, the circuit court, after "weighing equities and considering the slight benefits to individual taxpayers [affected by the invalid tax]," denied a refund of taxes collected under an unconstitutional statute. *Gulesian*, 281 So.2d at 326. Specifically, the circuit court found that plaintiffs and all other taxpayers had voluntarily paid the tax "without protest and not under compulsion;" that the School Board, which had levied the invalid tax, had relied in good faith on a presumtively (sic) valid state statute; and that requiring a refund "in small amounts to over 350,000 Dade County taxpayers would impose an intolerable burden on the School Board." *Id.* This Court agreed with the lower court's specific findings and reasoning and, therefore, affirmed.

In this case, however, the circuit court has not made specific findings regarding McKesson's claim for a refund and could not yet weigh the equities because the circuit court has not yet heard evidence on the issue. McKesson in its motions for partial summary judgment and for a preliminary injunction had not yet raised the issue of an appropriate refund. Therefore, when the circuit court decided to bar any relief for the injury McKesson has sustained during the period that Florida has collected the discriminatory taxes, it acted without first

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2 *See Coe v. Broward County*, 358 So.2d 214, 216 (Fla. 4th DCA 1978) (recognizing *Gulesian* as a narrow exception to the rule that a taxpayer is entitled to a refund of taxes paid pursuant to an unlawful assessment).

3 *See City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1, 7 (Fla. 1972); *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So.2d 993, 995 (Fla. 1976); *Osterndorf v. Turner*, 426 So.2d 539, 541, 545 (Fla. 1982); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Colding v. Herzog*, 467 So.2d 980, 983 (Fla. 1985).

hearing evidence on the refund issue.[4] McKesson has not had the opportunity to present its evidence to the lower court establishing the effect of the discriminatory tax burden on McKesson's business in Florida, including the effect on McKesson's sales, market share, and profit. In sum, McKesson has never had the opportunity to demonstrate the extent of the very competitive injury that this Court recognized in striking down the unconstitutional statutes.

Unlike the 350,000 taxpayers in *Gulesian* who were only slightly affected by the improper assessment, McKesson, which did pay the challenged tax under protest and did pay under compulsion, has incurred a substantial injury under a discriminatory scheme. Further, the State in this case did not *rely* on invalid statutes but rather *enacted* the unconstitutional statutes.[5]

By applying *Gulesian* in this case to bar any remedy, without first instructing the lower court to hear evidence and weigh the particular equities in this case, the Court appears to expand the narrow holding in *Gulesian* to bar any refund of taxes collected under an unconstitutional statute so long as the statute was presumptively valid before it was declared unconstitutional. McKesson submits that under such a doctrine no taxpayer will ever be entitled to a refund for unconstitutional taxes.

The Court's statement that "the cost of the tax has likely been passed on to their customers" (P. 16) should not serve to bar McKesson's opportunity to present evidence on the measure of its injury. First, the circuit court has not heard evidence on this "pass-on"

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4 McKesson raised the refund issue in this Court, as a cross-appellant, in response to the lower court's statement that its declaration of unconstitutionality would operate only prospectively, thereby barring any refund.

5 McKesson maintains that the State enacted the revised statutes to preserve the protectionism inherent in the former statutory scheme, and acted after the Florida Department of Business Regulation warned in a memorandum that the revised statutes continued the unconstitutional discriminatory effect of the old scheme.

issue. Second, regardless of whether the cost of the discriminatory tax has been passed on to McKesson's customers, McKesson has sustained an economic injury in the competitive marketplace. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the Supreme Court observed: "even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages."

Whether McKesson raised the price of its products to cover the added tax burden that the discriminatory tax scheme imposed, thereby selling fewer products than it otherwise would have, or did not raise the price of its products to cover the added burden, thereby reducing its profit margin, McKesson has been injured.[6]

Further, this Court plainly found that McKesson has sustained a competitive injury.

> It is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not . . . . Florida's alcoholic beverage tax scheme clearly raises the relative cost of doing business for a manufacturer or distributor of alcoholic beverages which are not [favored].

(P. 12-13)

The Florida alcoholic beverage tax scheme, by design, has imposed an unconstitutional burden on McKesson by raising its cost of doing business compared to distributors of the favored products. That burden continued even after the lower court declared the discrimination unconstitutional because the State's appeal invoked the automatic stay, Fla. R. App. P. 9.310(b)(2), which the lower court declined to lift.

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6 The alcoholic beverage excise tax is significantly different from the general sales tax, which is stated separately from an item's purchase price and for which retailers simply serve as collection agents for the state. *See* § 212.07(1)(a) and (2), Fla. Stat. (Supp. 1987)

McKesson respectfully urges the Court to determine that McKesson is entitled, under both federal constitutional law and state law, to receive a refund of the difference between what McKesson paid in taxes and what McKesson would have paid if its products had received the same treatment as the favored products. McKesson requests that the Court thereupon remand the case to the lower court to receive evidence to determine the amount of an appropriate refund.

Alternatively, McKesson respectfully requests that the Court remand this case to the lower court with instructions to hear evidence on the issue of McKesson's competitive injury, including evidence on the effect of the discriminatory burden on McKesson's business in

Florida, and then to weigh the particular equities and determine the measure of any relief.

DATED: March 3, 1988.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 70,368

(Caption omitted in printing)

RESPONSE OF DIVISION OF ALCOHOLIC BEVERAGES & TOBACCO AND OFFICE OF THE COMPTROLLER TO MOTIONS FOR REHEARING BY MCKESSON CORPORATON AND TAMPA CROWN DISTRIBUTORS, INC.

The DIVISION OF ALCOHOLIC BEVERAGES & TOBACCO and THE OFFICE OF THE COMPTROLLER (hereinafter "the State appellants") respond to the motions for rehearing filed by McKesson Corporation and by Tampa Crown Distributors, Inc. and show:

1. The motions contravene *Fla. R. App. P.* 9.330. They are no more than re-argument of the merits of the Court's order. All points and authorities presented by Appellees in the motions were fully briefed by the parties and fully addressed at oral argument. *See* Answer Brief of McKesson Corp. pp. 57-65; Cross Reply Brief of McKesson, Corp., pp. 9-15; Answer Brief of Tampa Crown Distributors, Inc., pp.49-50; Reply Brief of Tampa Crown Distributors, Inc. pp.1-4; Reply Brief of State appellants, pp. 27-38. The motions are thus clearly inappropriate. *Payne v. Ivey*, 83 Fla. 436, 93 So. 143 (1922); *State ex rel. Jaytex Realty Co. v. Green*, 105 So.2d 817 (Fla. 1st DCA 1958); *Whipple v. State*, 431 So.2d 1011 (Fla. 2d DCA 1983).

2. Contrary to the Appellee's assertion that *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973) is a "narrow exception" to an alleged rule requiring taxpayer refunds, this Court has noted that *Gulesian* is not narrowly limited to its facts and, in fact, that its holding is supported by the mainstream of cases which have many times opted for prospective-only relief when a statute, presumed to be constitutional, is declared otherwise. *Deltona Corp. v. Bailey*, 336 So.2d 1163 (Fla. 1976). Indeed this Court affirmed prospective-only relief in *Gulesian* principally because of the school board's reliance on

the presumptive validity of the statute. *Gulesian v. Dade County School Bd., supra,* at 327. *See also Deseret Ranches of Fla,[sic] Inc. v. St. John's River Water Management Dist.*, 406 So.2d 1132, 1142-43 (Fla. 5th DCA 1981) *mod. on other grounds* 421 So.2d 1067 (Fla. 1982). The trial court found the challenged statutory amendments to be "an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverages laws resulting from the *Bacchus* decision," R. Vol. II, p. 310; Vol. VI, p. 991, thus entitling them to treatment as presumptively valid enactments, and bringing this case within the line of cases which allow for prospective-only relief.

Moreover, the beverage statutes make it clear that wholesale beverage distributors are, functionally, conduits for the collection of the beverage tax from their customers. Section 561.42, Florida Statutes, requires that the distributors' customers make payment for all shipments within ten days. Section 561.50, Florida Statutes, however, does not require remittance of the tax by the distributors to the State until the tenth day of the month following the month of sale. The distributors thus have a "float" period between the collection of charges from their customers and remittance of the tax which ranges between ten and 41 days. Recognizing that fact, the Legislature has provided in § 561.506, Florida Statutes, that the payments made by the distributors are in reality *tax collection* payments and has given the distributors collection allowances quite similar to the collection allowances for sales tax dealers. *Compare* §§ 564.06(7), 565.13, Fla. Stat (1983) *with* §212.12, Fla. Stat. (1983). Such is sufficient to bring this case within the rule of *State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529, 532 (Fla. 1974). The Appellees are not entitled to a windfall from a retroactive ruling.

3. No evidentiary hearing is required on the alleged effect of the tax on Appellees' market shares or profits. Appellees continue to assert, incorrectly, that they are entitled to a tax refund, not because they bore the financial burden of the tax, but, instead, as a measure of compensation for alleged business injury. The claim that Appellees are entitled to damages for business injury runs afoul of the State's sovereign immunity. The state retains its immunity against damage claims founded upon allegations that a legislative act has caused the injury. *See Trianon Park Condominium Ass'n v. City of Hialeah*, 468

So.2d 912, 918-919 (Fla. 1985). Sovereign immunity bars such a claim, whether straightforward or artfully disguised as a tax refund claim. *Shannon v. Hughes & Co.*, 270 Ky. 530, 109 S.W. 2d 1174, 1177 (1937). Section 215.26, Florida Statutes, allows only refunds of taxes, not payment of compensatory damages.

4. Scores of modern decisions, both state and federal, have opted for decrees without retroactive effect. The courts have done so in cases involving the constitutionality of tax exemptions and tax laws. *E.g., Gulesian v. Dade County School Bd., supra; Metropolitan Life Ins. Co. v. Commissioner of Insurance*, 373 N.W. 2d 399 (N.D. 1985). They have even done so in cases involving enforcement of the Civil Rights Act of 1964, the enforcement of which receives special deference. *E.g., City of Los Angeles, Dep't. of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L. Ed.2d 657 (1978); *Arizona Governing Committee For Tax-Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed. 2d 1236 (1983). The Court's prospective-only declaration in this case is well within the channel of those cases and no federal case on point calls for a contrary result. It is worthy of note that the United States Supreme Court has refused to adopt a rule of decision requiring tax refunds in several recent decisions where the tax laws of various states have been found to contain constitutional defects and has, instead, remanded such cases to the state courts to determine whether the remedy of a tax refund is appropriate or not. *Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed. 2d 11 (1985); *Tyler Pipe Industries, Inc. v. Washington Dep't. of Revenue*, 483 U.S. ____, 107 S.Ct. 2829, 97 L.Ed. 2d 2211 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

WHEREFORE, the State appellants request that the Court deny the motions for rehearing by McKesson Corporation and by Tampa Crown Distributors, Inc.

(Certificate of service omitted in printing)

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

No. 70,368

(Caption omitted in printing)

JACQUIN-FLORIDA DISTILLING AND TODHUNDER INTERNATIONAL MOTION FOR STAY OF THE MANDATE SHOULD THE PENDING MOTION FOR REHEARING BE DENIED

Jacquin-Florida Distilling Co., Inc. and Todhunter International, Inc. have filed a Motion for Rehearing which is currently pending before the Court. Should that Motion be denied, Jacquin-Florida and Todhunter respectfully request that the Court stay issuance of its mandate pending the filing of a petition for writ of certiorari to the Supreme Court of the United States and, upon timely filing, stay the mandate until the Supreme Court acts on the petition. The certiorari petition will be filed within thirty days of this Court's order denying rehearing if the mandate is stayed. The promise of prompt filing reflects Jacquin-Florida's and Todhunter's desire to avoid delay and expeditiously resolve the substantial issues presented by this Court's opinion.

The reasons for granting certiorari are substantial. First, this Court's decision presents the unanswered question of whether an alcoholic beverage tax statute which is not tied to local production is invalid. In *Bacchus Imports, Ltd. v. Dias*, ___ U.S. ___, 104 S.Ct. 3049 (1984), the Court wrote:

> [T]he effect of the exemption is clearly discriminatory in that it applies only to locally produced beverages, even though it does not apply to all such products. Consequently, as long as there is some competition between the locally produced

> exemption products and non-exemption products from outside the State, there is a discriminatory effect.

Id., at 3056. In the instant case the beneficial tax rate is available to all manufacturers without regard to their location or the source of the agriculture used to manufacture the beverage. Therefore the petition would present an important question unanswered in *Bacchus*:

> MAY A STATE, POST *BACCHUS*, PROVIDE BENEFICIAL TAX RATES TO ALCOHOLIC BEVERAGES MADE FROM SPECIFIED AGRICULTURAL PRODUCTS AS LONG AS THOSE BENEFICIAL RATES ARE AVAILABLE TO ALL MANUFACTURERS AND ARE NOT TIED TO LOCAL PRODUCTION OF THE BEVERAGES, NOR TO LOCAL PRODUCTION OF THE AGRICULTURAL PRODUCTS FROM WHICH THE BEVERAGES ARE MADE?

Second, whether or not the Twenty-first Amendment to the United States Constitution allows a state to enact an evenhanded alcoholic beverage taxing statute is still not completely resolved. Three justices in *Bacchus* would have upheld the Hawaii statute under the authority of the Twenty-first Amendment. *See*, dissent of Justices Stevens, Rehnquist and O'Connor in *Bacchus*, 104 S.Ct. at 3059. Justices White, Burger, Powell, Blackmun and Marshall formed the *Bacchus* majority. (Justice Brennan did not participate in *Bacchus*.) Justices Burger and Powell are no longer on the Court, having been replaced by Justices Scalia and Kennedy. Justice Kennedy's views are unknown. Justice Scalia has taken a dim view of assertive judicial use of the Commerce Clause:

> The historical record provides no grounds for reading the Commerce Clause to be other than what it says--an authorization for Congress to regulate commerce.

> *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, __ U.S. ___, 107 S.Ct. 2810, 2828 (1987) (Scalia, J., dissenting in part).

Given that view, Justice Scalia may be a fourth vote for certiorari on the Twenty-first Amendment issue.

Third, this Court's decision specifically rejects the Commerce Clause analysis used by the Colorado Supreme Court in *Archer Daniels Midland Co. v. State*, 690 P.2d 177 (Colo. 1984): "We find the *Exxon* decision clearly distinguishable from the situation before us and question whether *Exxon* was properly applied by the Colorado Court in *Archer Daniels*." *Division of Alcoholic Beverages and Tobacco, et al. v. McKesson Corp., et al.*, ____ So. 2d ___, 13 F.L.W. 120,123 (1988). And the Court's analysis in this case is at odds with *New Energy Co. of Indiana v. Limbach*, 513 N.E.2d 258 (Ohio 1987), probable jurisdiction noted, 108 S.Ct. 500 (1987). Different results from different state supreme courts regarding proper application of constitutional principles is another reason for the Supreme Court to exercise its certiorari jursidiction. *See*, Rule 17, Rules of the Supreme Court of the United States. The noting of probable jurisdiction in *Limbach* reflects the importance of the issues at stake in those state attempts to walk the Commerce Clause line.

Thus, because the questions are substantial, the reasons for granting certiorari are present, and the application for certiorari will be expeditiously filed, Jacquin-Florida and Todhunter International respectfully request that the Court stay issuance of its mandate pending the filing of a petition for writ of certiorari within 30 days of an order of this court denying rehearing, and, upon proof of such timely filing,

this Court permit the stay of mandate to remain in effect until the Supreme Court of the United States acts upon the petition.

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On Behalf of Todhunter International, Inc. and Jacquin-Florida Distiling Co., Inc.

(Certificate of Service omitted in printing)

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Case No. 70,368

(Caption omitted in printing)

RESPONSE OF DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION AND OFFICE OF THE COMPTROLLER, STATE OF FLORIDA TO JACQUIN-FLORIDA DISTILLING'S AND TODHUNTER INTERNATIONAL'S MOTION FOR STAY OF MANDATE SHOULD THE PENDING MOTION FOR REHEARING BE DENIED

The Division of Alcoholic Beverages And Tobacco, Department of Business Regulation and the Office of the Comptroller, State of Florida (hereinafter referred to as "the State appellants") hereby respond to the motion for stay of mandate by Jacquin-Florida Distilling Company, Inc. and Todhunter International, Inc.

The State appellants recognize that the grounds for granting certiorari by the Supreme Court of the United States are substantial. Nevertheless, the State appellants do not support the motion to stay this Court's mandate once the pending motions for rehearing are ruled upon. The State appellants submit that the opinion of this Court ought to operate as the law of this State, pending potential review by the Supreme Court of the United States, in order to avoid uncertainty in

the administration of the beverage excise tax laws of this State and revenue collections pursuant thereto.

Respectfully submitted,

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SUPREME COURT OF FLORIDA
Monday, May 2, 1988

CASE NO. 70,368
Circuit Court Nos. 86-2997, 86-3430 & 86-773
District Court of Appeal,
1st District - Nos. BS-402, BS-304 & BS-404

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, etc., et al.,

Appellants/Cross-Appellees,

v.

McKESSON CORPORATION, et al.,

Appellees/Cross-Appellants.

* *

Upon consideration of the Motion for Rehearing filed in the above cause by attorneys for McKesson Corporation, the Motion for Rehearing filed by attorneys for Tampa Crown Distributors, Inc., and the Motion for Rehearing filed by attorneys for attorneys for Jacquin-Florida Distilling co., Inc. and Todhunter International, Inc., and responses thereto,

IT IS ORDERED that said Motions be and the same are hereby denied and it is further

ORDERED that the Motion for Stay of the Mandate Should the Pending Motion for Rehearing be Denied filed by attorneys for

Jacquin-Florida Distilling and Todhunter International is hereby denied.

TC
cc: Hon. Raymond E. Rhodes, Clerk
Hon. Charles E. Miner, Jr., Judge
Hon. Paul F. hartsfield (sic), Clerk
David G. Robertson, Esquire
Neal S. Berinhout, Esquire
Chris W. Altenbernd, Esquire
Charles A. Wachter, Esquire
M. Stephen Turner, Esquire
Daniel C. Brown, Esquire
Harold F. X. Purnell, Esquire
Barry R. Davidson, Esquire
Jack M. Coe, Esquire
Bruce S. Rogow, Esquire
Howell L. Ferguson, Esquire
Joseph Klock, Esquire
John K. Aurell, Esquire

MANDATE
SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the Circuit Court in and for Leon County, Florida

WHEREAS, in that certain cause filed in this Court styled:

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, etc., et al.
- vs -
McKESSON CORPORATION, et al.

Case No. 70,368

Your Case No. 86-2997, 86-3430, 86-773

The attached opinion was rendered on February 18, 1988

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Parker Lee Mc Donald
Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, [sic]
on this 2nd day of May 1988

SUPREME COURT OF THE UNITED STATES

No. 88-192

McKesson Corporation,

Petitioner

v.

Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida, et al.

[Respondents]

ORDER ALLOWING CERTIORARI Filed November 14, 1988.

The petition herein for a writ of certiorari to the Supreme Court of Florida is granted. This case is consolidated with No. 88-325, *American Trucking Associations, Inc., et al. v. Maurice Smith, Director, Arkansas Highway and Transportation Department,* and a total of one hour is allotted for oral argument.

November 14, 1988